Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FULTON COUNTY, GEORGIA, ROBERT J. REGUS and MICHAEL G. COOPER,

Petitioners,

v.

CHESTER L. LAMBERT, WILLIAM E. MOWREY and JAMES M. HEATH,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether certiorari should be granted to resolve a conflict among the United States Courts of Appeal as to the standard for proper comparators in a disparate discipline employment discrimination case?

2. Whether certiorari should be granted to review the Eleventh Circuit's application of the doctrine of qualified immunity?

PARTIES TO THE PROCEEDING

***Petitioners*:**

Fulton County, Georgia
Robert J. Regus
Michael G. Cooper

***Respondents*:**

Chester L. Lambert
James M. Heath
Estate of William E. Mowrey

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PETITION FOR WRIT OF CERTIORARI

Petitioners Fulton County, Georgia, Robert J. Regus and Michael G. Cooper respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the panel of the court of appeals in this case is reported at 253 F.3d 588, and is reprinted at Appendix B. One of the relevant orders of the United States District Court, Northern District of Georgia, is reported at 97 F. Supp. 2d 1380, and is reprinted at Appendix D; the other relevant order of the district court was not reported, but is printed at Appendix C. Citations to the trial transcript are denoted as, e.g., "Trans.—pp. 694-95." Citations to trial exhibits are denoted as "PE#" and "DE#."

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Appendix reproduces relevant portions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981 and 1983, and the text of Section 1 of the Fourteenth Amendment to the United States Constitution.

JURISDICTION

The Eleventh Circuit entered its opinion and order on June 6, 2001, and denied Petitioners' Petition for *Rehearing En Banc* on January 17, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

A. FULTON COUNTY EMPLOYEES INVOLVED IN THIS CASE

Beginning in December 1995, Petitioner Regus served as Fulton County's County Manager. (Trans.—pp. 1598:23-1599:2). As County Manager, Regus was the Chief

Executive Officer of Fulton County and had supervisory authority over all Fulton County employees. (Trans.—p. 1688:13-18). In 1995 and 1996, Petitioner Cooper served as Director of Fulton County's Office of Contract Compliance and Equal Employment Opportunity ("EEO Department") and reported directly to Regus. (Trans.—pp. 1520:4-8; 1520:24-1521:1). In this position, Cooper was responsible for investigating discrimination complaints lodged against Fulton County by its employees, preparing reports of his investigative findings and recommending corrective action if appropriate. (Trans.—pp. 1600:8-13; 1642:5-9; 1704:21-25).[1]

From August 1995 through mid-May 1996, Mozell Acey served as Human Resources Coordinator on the Department of Public Works' staff and was not in Respondents' chain of command. (Trans.—pp. 1014:22-23; 1015:14-16; 1110:25-1111:3; 1114:4-13; 1366:6-9). As Human Resources Coordinator, Acey interacted with the EEO Department in responding to complaints of discrimination filed by employees. (Trans.—pp. 1170:13-1171:9).

Respondent Lambert began his employment with Fulton County in 1975. In 1995 and 1996, he held the position of Civil Engineer III, and was responsible for the North Fulton water system and water and sewer maintenance. (Trans.—pp. 521:10-13; 522:2-9). Respondent Mowrey began his employment with Fulton County in 1989. In 1995, he became Area Construction Supervisor, Operations Manager, and was responsible for maintaining and constructing sewer lines for the South Fulton (Camp Creek) and North Fulton (Big Creek) waste water treatment facilities. (Trans.—pp. 223:25-224:1; 224:15-21; 226:6-20). Respondent Heath began his employment with Fulton County in

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[1] It was not disputed at trial that Cooper had no authority to discipline Respondents or the other employees involved in the Big Creek situation. (Trans.—pp. 1238:24-1239:3).

December 1988 as a supervisor in the Department of Public Works, and in 1995, he became acting supervisor at Big Creek. (Trans.—pp. 744:24-25; 747:6-12). Mowrey reported to Lambert and supervised Heath. (Trans - pp. 225:10-12; 336:3-13, 22-24; 1015:7-10). Heath, in turn, supervised two field supervisors: Mark Collett (white) and Curtis Brown (African American). (Trans.—p. 593:19-24). In these positions, each of the Respondents was responsible for, among other things, responding to employee complaints of racial harassment. (Trans.—pp. 627:3-7; 649:15-17; 864:17-865:7).

B. RACIAL INCIDENTS AT BIG CREEK

Racial slurs creating hostile environment for African American employees and Respondents' inaction. By memorandum dated August 21, 1995, David Parker, an African American employee at Big Creek, complained to Lambert about, among other things, supervisors using racial slurs to and about subordinate employees. (Trans.—pp. 524:11-15; 525:5-10; PE#20). Lambert, however, did not investigate Parker's allegations or even speak with Parker or any other employees about the allegations. (Trans.—pp. 593:5-10; 616:12-14). In fact, the only thing Lambert did in response to Parker's memorandum was forward a copy of it to Heath who, in turn, drafted a response for Lambert. (Trans.—pp. 525:14-19; 526:1-37 PE#21; 761:24-762:8). Heath, however, did not speak to Parker or any other employees or otherwise investigate the allegations raised in the memorandum prior to drafting a response for Lambert. (Trans.—pp. 590:25-591:2; 593:11-14; 617:19-22; 881:4-15). In fact, Heath did absolutely nothing to find out if there was any substance to Parker's claims. (Trans.—p. 880:19-24).

Relying solely upon Heath's response and Mowrey's statement that he "knew of no other problems" at Big Creek, Lambert responded in writing to Parker's complaint. (Trans.

—pp. 528:22-529:9; 597:5-9; PE#22). As for Parker's complaints about supervisors using racial slurs, Lambert wrote:

> Each of us comes to the job from a different environment and background. It is natural to distrust those that are different from ourselves . . . No one enjoys criticism. In a situation where the supervisor and employee are of different races, criticism can easily be misinterpreted. The employee must ask himself, 'Is it because my supervisor is prejudiced against me or is it because I made a mistake that needs to be corrected?'

(Trans.—p. 610:8-19; PE#22). Other than this memorandum, Lambert took no action in response to Parker's complaints about the use of racial slurs by supervisors and did not follow up with Parker to see if his concerns had been addressed adequately. (Trans.—pp. 560:12-14; 592:14-17).

Respondents' inaction to racially inflammatory notebook. On September 14, 1995, Parker and Arthur Glass, another African American Big Creek employee, found a notebook in a truck used by Terry Adams, a white crew leader at Big Creek. (Trans.—p. 771:2-21; DE#2). By the time Heath arrived at work, Parker and Glass had summoned a police officer, and the four of them examined the notebook, which contained drawings of confederate flags, flames, a hangman's noose hanging from a tree over a tombstone that read "burn in hell", a hooded figure resembling a Klansman and racial slurs, including "FUCK YOU NIGGER." (Trans.—p. 771:22-24; DE#2). Heath copied the notebook and gave it to the police officer for investigation. (Trans.—pp. 771:24-772:10). Heath then called Mowrey and told him about the notebook. (Trans.—p. 261:1-9). Approximately two hours later, the police called and instructed Heath to come pick up the notebook, stating that it was an internal matter, not a matter for the police. (Trans.—pp. 363:11-15; 772:21-773:3). After discussing the notebook with Heath, Mowrey felt that its contents could create a hostile work environment. (Trans.—pp. 261:12-18; 363:16-18; 773:25-

774:4). Heath met with Adams and his crew (Travis Richey and Randy Moore, both of whom are white). Adams admitted drawing the flames, Richey admitted drawing the confederate flags and Moore admitted drawing the tree and noose. In response, Heath sent only Richey home to "defuse" the situation. (Trans.—pp. 774:8-23).

The next day, Mowrey contacted Lambert's superior, who instructed him to meet with the individuals responsible for the notebook. (Trans.—pp. 266:7-9; 267:1-5; 1293:7-10). On September 18, 1995, Mowrey and Heath met with Richey, Adams and Moore. (Trans.—pp. 267:18-21; 268:20-24; 774:24-775:7). The men gave written statements wherein they admitted making the drawings in the notebook, but denied writing any of the racial slurs. (Trans.—pp. 268:20-269:5; PE#24-26). Mowrey did not, however, interview either Parker or Glass about the notebook. (Trans.—p. 368:21-24). Despite the fact that several employees had access to the notebook before it was found by Parker and Glass, Mowrey did not interview any other employees. (Trans.—p. 368:11-20). In fact, other than speaking with Adams, Richey and Moore, Mowrey did not further investigate the notebook and never ascertained the identity of the individual(s) responsible for drawing some of the pictures and writing any of the slurs in the notebook. (Trans.—pp. 370:9-17; 375:1-5; 1369:6-10). Mowrey did not contact anyone in the County Attorney's office, the EEO Department or the Human Resources Department for assistance. (Trans.—pp. 378:23-379:6). Mowrey testified he had hoped the police would take care of interviewing employees, but admitted that the police had already returned the notebook and told Heath that they could not investigate. (Trans.—pp. 377:21-378:8).

Lambert, who was on vacation when the notebook originally was discovered, learned about it approximately one week later, but did not meet with any employees about the notebook or take any other action. (Trans.—pp. 541:18-542:2; 631:21-22; 638:14-16; 640:2-5). Furthermore, despite

his concern about the effect the notebook might have on the working environment, Lambert failed to contact anyone outside the department for assistance. (Trans.—pp. 637:9-13; 638:8-10; 639:21-640:1).

Racial graffiti and Respondents' inaction. In October 1995, Woody Bidwell, a supervisor who was filling in for Heath (who was out sick), informed Mowrey that a racial slur had been found on a break room wall at Big Creek. (Trans.—pp. 273:7-11; 390:18-24). Because this was the third incident involving racial slurs of which he was aware in three months, Mowrey was concerned that a pattern was developing. (Trans.—pp. 395:2-10). Nevertheless, Mowrey did not contact the County Manager's office or the EEO Department for assistance. (Trans.—pp. 396:6-15). Mowrey neither met with employees about, nor kept any documentation of, the incident. (Trans.—pp. 393:13-19). Mowrey instructed Bidwell to photograph and paint over the slur and to contact the police. (Trans.—pp. 275:2-14; 391:2-4). Mowrey subsequently sent an African American employee to paint over the racial slur. (Trans.—p. 394:12-16). Because the racial slurs continued, Mowrey admitted that whatever steps he had taken were ineffective in stopping them. (Trans.—pp. 407:16-17; 453:20-23).

Additional racial graffiti and Respondents' inaction. On January 11, 1996, Lambert met with Brown to discuss sewer surveillance work. (Trans.—p. 542:15-19). After the meeting, Parker approached Lambert and asked him what he was going to do about the racial problem at Big Creek. (Trans.—p. 542:19-21). Parker then showed Lambert two racial slurs in the break room—one on the wall and one on the door. (Trans.—pp. 275:17-24; 542:21-543:9). Although Mowrey and Heath had been aware of the writings, they had not informed Lambert. (Trans.—pp. 544:13-16; 642:9-14; 645:18-21; 649:12-14). Lambert believes that supervisors should communicate employee harassment complaints to

their superiors, and felt that Mowrey and/or Heath should have reported the slurs to him when they occurred and that their failure to do so was a mistake. (Trans.—pp. 646:4-7, 15-18; 647:1-6; 650:1-6). Later that day, Lambert told his superior, Frank Bockman, the Director of the Public Works Department, that there were still "serious racial problems at Big Creek." (Trans.—p. 545:11-16). Bockman instructed Lambert to meet with Mowrey and Heath and to thoroughly investigate the situation. (Trans.—p. 545:16-18).

The next day, Lambert met with Mowrey and Heath and ordered them to investigate the incidents and repaint the entire break room, because he felt that simply painting over the slur had been an inadequate response. (Trans.—pp. 276:6-9; 405:13-17; 544:2-9; 546:24-547:1; 651:15-19). Lambert never relieved Mowrey of responsibility for heading up this investigation. (Trans.—p. 688:17-19). Respondents' "investigation" of the incidents consisted of repainting the break room, replacing the door and talking about possibly installing surveillance cameras in the work place. (Trans.—pp. 410:12-14; 660:1-14). Respondents did not interview any employees, hold any group meetings with them to address the situation or attempt to find out who may have been responsible for the slurs. (Trans.—pp. 662:15-17; 662:25-663:2). Lambert testified that Respondents' response to the Big Creek situation prior to the installation of surveillance cameras in March 1996 was inadequate and, in retrospect, he believes that he should have done more. (Trans.—pp. 662:8-9; 663:3-6).

Additional racial slurs and Respondents' inaction. In early 1996, Glass complained to Heath that another employee had referred to him as a "sorry ass" black man. (Trans.—p. 805:3-8). Heath questioned the employee, who admitted that he "probably" said "something to that effect." (Trans.—p. 805:12-13). Heath did not discipline the employee for his admitted racial remark, but instead told him that it was

"inappropriate" and "would not be tolerated." (Trans.—pp. 805:14-15; 806:7-10). Although he would expect Heath to bring this to his attention, Mowrey was not aware of Glass' complaint to Heath or that a white Big Creek employee named Barry Woodall had been referred to as a "nigger lover." (Trans.—pp. 442:6-443:4). Bockman testified that although it is important to document employee complaints and that he expects his employees to keep him informed, he was unaware of these comments until he and Acey interviewed Woodall in March or April 1996. (Trans.—pp. 1397:4-1398:6; 1399:11-23). Lambert was also unaware of these comments and testified that the employees who made them should have been suspended and the manager who failed to report them to Lambert disciplined. (Trans.—pp. 655:12-656:5). Mowrey admits that this sort of comment creates a hostile work environment for all employees. (Trans.—pp. 443:5-12).

EEOC charges involving Big Creek facility. On January 26, 1996, Parker and Glass filed charges of discrimination with the United States Equal Employment Opportunity Commission ("EEOC"), which were received by the Department of Public Works sometime in February 1996. (Trans.—pp. 1196:20-1197:4; 1199:16-20; DE#15-16; 1300:24-1301:7; PE#53). According to Acey, this was the first she had heard about any problem with racial harassment at Big Creek. (Trans.—pp. 1200:19-1201:12). Bockman assigned Acey to coordinate the department's efforts to respond to the charges. (Trans.—pp. 1301:21-24). Acey met with Respondents on February 21, 1996, and asked each of them to write a report summarizing what had happened at Big Creek, when it had happened and how they responded. (Trans.—pp. 432:9-22; 547:2-15; 793:15-19; 794:3-12; PE#35; 1173:23-1174:8).

Additional racial slurs and Respondents' inaction. On or about February 16, 1996, another racial slur was found on the break room wall. (Trans.—pp. 277:2-3; 287:22-288:4;

781:25-782:9). Mowrey told Lambert about the slur, and Heath removed the time clock and locked the break room until it could be repainted. (Trans.—pp. 288:7-13; 412:11-13; 671:23-672:10; 782:10-13). Lambert did not suggest that Mowrey take any further action, such as meeting with the employees or contacting the Human Resources department. (Trans.—pp. 672:18-673:3). Instead, even though the police previously declined to investigate and had been ineffective thus far, Mowrey had Heath call the police. (Trans.—pp. 412:14-17; 413:9-12).

Additional racial slurs and Respondents' inaction. On or about February 19, 1996, Parker informed Heath that a letter and envelope containing racial slurs had been found on Parker's county vehicle. (Trans.—pp. 289:6-10; 784:12-20). Heath told Mowrey about the letter, and Mowrey instructed that the police be called to fingerprint the envelope and letter. (Trans.—pp. 289:10-12; 784:20-23; 785:5-7). However, neither Mowrey nor Heath further investigated the incident. (Trans.—pp. 420:15-421:15; 674:9-12). Moreover, although this was the sixth racial incident in six months, and Lambert had specifically instructed Mowrey to thoroughly investigate, Mowrey still had not met with the employees or contacted the EEO Department, County Manager's office or County Attorney's office for assistance. (Trans.—pp. 420:18-421:18).

Additional racial slurs and Respondents' inaction. On February 21, 1997, Parker found another racist note in a county van. (Trans.—pp. 290:8-12; 421:16-18; 674:19-24; 786:15-19). Mowrey contacted Bockman and the police, despite their previous inaction and ineffectiveness. (Trans.—pp. 674:25-675:16). Neither Mowrey nor Lambert took any other steps to respond to the incident, such as meeting with the employees to try to determine who had written the note,

or contacting other departments for help. (Trans.—pp. 420:21-421:15; 676:1-6).[2]

Cut brake line incident. On February 22, 1996, Parker and Glass complained that the brake line on their vehicle had been cut. (Trans.—pp. 300:20-301:12). Mowrey instructed Mark Collett to secure the vehicle, take it to Fulton County's vehicle service center to be inspected and contact the police. (Trans.—pp. 304:2-7). After having the brake line inspected, it was determined that the line had indeed been cut in four places, compromising the integrity of the line. (Trans.—pp. 303:5-304:10; 791:17-22; PE#32; 792:7-12).

Respondents' first meeting with Big Creek employees. On February 26, 1996, Bockman met with all of the employees at the Big Creek facility, including Respondents. Acey also attended. (Trans.—pp. 294:13-295:1; 789:12-21). At the meeting, Lambert stated that the racial incidents were in violation of Fulton County policy and would not be tolerated. (Trans.—pp. 684:18-25). Although racial incidents at Big Creek dated back at least as far as August 1995, this was the first and only meeting held by management at Big Creek with all the employees in attendance wherein racial harassment was discussed. (Trans.—pp. 428:9-22; 429:10-15; 1392:9-15).

C. INVESTIGATION OF THE SITUATION AT BIG CREEK

Cooper takes action. On February 15, 1996, Bockman forwarded copies of Parker's and Glass' EEOC charges to Cooper. (Trans.—pp. 1300:24-1301:11; PE#53; 1301:19-1302:1). Cooper instructed Bockman that the department needed to respond in writing by February 29, 1996, so that

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[2] According to Lambert, around this time, Respondents all began to suspect that Parker was responsible for the racial incidents. Respondents did not, however, make any efforts to confirm their suspicions. (Trans.—pp. 676:7-678:2).

the County Attorney's office could draft a response for the EEOC. (Trans.—pp. 1304:14-23; PE#71). Based on the written summaries Respondents had prepared for Acey, Acey drafted a memorandum for Bockman's signature, which was submitted to the EEO Department on February 29, 1996. (Trans.—pp. 1305:14-1306:7; 1306:11-20; PE#37). In the memorandum, Bockman admitted that efforts to control the situation at Big Creek had not been successful, but vowed to continue the investigation. (Trans.—PE#37). By letter dated March 4, 1996, Cooper forwarded Bockman's memorandum to then-County Attorney Susan Forsling, Esq., and requested that her office prepare a written statement of position to be submitted to the EEOC in response to Parker's and Glass' charges. (Trans.—pp. 1575:17-1576:12; PE#54).

In the meantime, the EEO Department conducted its own investigation of the Big Creek situation. (Trans.—pp. 314:10-12; 447:1-2; 552:17-22). Cooper and Tilford Belle, an EEO Department investigator, conducted numerous interviews with Public Works Department employees, some of which were tape recorded. (Trans.—pp. 1531:14-23; 1533:23-1534:4; 1537:16-18). Cooper and Belle also documented their investigation in writing. (Trans.—p. 1537: 13-15). At the conclusion of the EEO Department's investigation, Cooper sent Regus two reports of his findings. (Trans.—pp. 1518:3-5, 22-24; 1523:22-1524:1; PE#7).

Additional racial slurs and Respondents' response. On March 12, 1996, Curtis Brown found another racial slur written on a bathroom wall at Big Creek. (Trans.—pp. 686:21-25; 797:21-798:1). Heath had the slur photographed and removed and wrote two memoranda to Mowrey outlining his actions. (Trans.—pp. 799:5-18; PE#36; 801:21-802:7). Other than his memorandum to Lambert following Parker's August 1995 complaint and notes in his personal diary, this was the first written report by Heath of any of the race related incidents at Big Creek. (Trans.—pp. 445:25-446:4; Doc

185—Pg 687:15-22). By all accounts, whatever actions Respondents had taken in response to the Big Creek situation up to that point were ineffective in correcting the problem. (Trans.—pp. 688:24-689:9; 1421:4-9; 1426:18-21).

Beginning March 27, 1996, Bockman and Acey interviewed employees as part of the Department of Public Works' investigation of the racial incidents at Big Creek. (Trans.—pp. 1120:8-1121:7; DE#111; 1212:6-8; 1395:6-10). Acey prepared a report dated May 14, 1996, which summarized the interviews and recommended several measures for responding to any future allegations of racial harassment. (Trans.—DE#111). In particular, the report recommended that all future incidents be documented and communicated to the Human Resources Coordinator. (*Id.*). Acey made this recommendation because there had not been sufficient documentation of the Big Creek situation. (Trans.—p. 1396:16-19).

Other than the notebook, however, Bockman and Acey were unable to identify the person responsible for the racial incidents at Big Creek. (Trans.—pp. 1126:15-18; 1127:18-21). Acey also acknowledged that she did not think that the Big Creek employees had been truthful and forthright during the interviews and that the EEO Department investigation had uncovered facts that Bockman's and Acey's investigation had missed. (Trans.—pp. 1209:13-1210:4).

Regus takes action. Regus first learned about the Big Creek situation in April 1996, when the county's Director of Information and Public Affairs contacted Regus about a media request pertaining to the events at Big Creek.[3]

[3] During this investigation, Mark Winne, a reporter for WSB-TV, made an Open Records Act request for Cooper's report. (Trans.—p. 1685:16-25: DE#90). Denval Stewart, Esq., Assistant Staff Counsel in the County Attorney's office, responded to Winne's request and told him that the report could not be released because the situation at Big Creek was still under investigation. (Trans.—pp. 1406:21-1407:8; DE#92).

(Trans.—pp. 1599:24-1600:3; 1691:10-14, 20-21). Regus also learned at that time that Big Creek employees had filed EEOC charges and that Cooper and Bockman were each investigating the charges. (Trans.—pp. 1691:23-1692:9). Because both the acting department head (Bockman) and the Director of the EEO Department (Cooper) were investigating, Regus did not respond to the media request and took no action at that time. (Trans.—pp. 1600:8-13; 1692:7-9, 16-21).

Cooper's first report. Regus received Cooper's first report of his investigation on April 29, 1996. (Trans.—p. 1518:3-5). Regus did not show the report to anyone. (Trans.—p. 1702:23-25). On May 2 or 3, 1996, Regus received a copy of a May 2, 1996, letter from Denval Stewart to Bockman, forwarding a copy of a May 1, 1996, letter from Stewart to Cooper. (Trans.—pp. 1518:6-10, 13-15; 1606:20-23). Stewart's letter, which was prepared at Bockman's request on behalf of the Department of Public Works, addressed Bockman's concerns about Cooper's April 29, 1996, report. (Trans.—pp. 1320:3-17; PE#57; 1404:7-23; 1405:18-25; 1406:5-6; 1518:5-6, 15-17). In short, Stewart's letter stated that the Department of Public Works could not act on the facts and recommendations in Cooper's report and asked Cooper to complete the report by identifying the employees he believed had committed an act or omission that amounted to racial discrimination or harassment. (Trans.—PE#57). The letter also stated that the Department of Public Works was still conducting its own investigation. (*Id.*).

Cooper's second report. Regus subsequently asked Cooper to provide another report which "named names," and on May 3, 1996, Cooper submitted a revised version of his April 29 report. (Trans.—pp. 1518:22-24; 1523:21-1524:1; PE#7; 1586:15-19; 1606:4-7; 1704:1-6). In the May 3 report, Cooper identified individuals whom he believed either created the problems at Big Creek or allowed them to continue. (Trans.—p. 1524:6-9, 21-25). Cooper's report

recommended that some disciplinary action be taken, but did not recommend that any particular individuals be disciplined. (Trans.—pp. 1523:19-20). Regus did not make any disciplinary decisions upon receiving Cooper's May 3 report, because he wanted to wait for Bockman's report so that he could "hear both sides." (Trans.—pp. 1704:7-20).[4]

Because Fulton County was required by law to release the report, which had been requested by Winne pursuant to the Open Records Act, Regus sent a copy to the Fulton County Board of Commissioners on May 13, 1996, to apprize them of what was going to be produced to the media. (Trans.—pp. 1602:16-19; 1603:1-9; 1632:5-9; 1653:23-1654:3).

On May 3, 1996, after he had issued his revised report, Cooper received a copy of Stewart's May 1, 1996, letter. (Trans.—pp. 1518:17-18). On the same date, Cooper received a copy of the Department of Public Works' statement of position to the EEOC, which Stewart had drafted in response to Parker's and Glass' charges of discrimination, and forwarded it to the EEOC. (Trans.—pp. 1518:19-21). Although Cooper was aware that the statement of position contradicted the findings of his department's investigation, he did not view it as something he had to defend because it was written by Stewart, the Department of Public Works' attorney, who did not consult with Cooper prior to drafting the document. (Trans.—pp. 1558:19-25).[5] The EEOC conducted its own investigation into the matter and subsequently issued its determination that there was reason to believe that a

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[4] As Regus testified, Cooper was investigating as an officer of the county on behalf of Regus, whereas Bockman was preparing a report on behalf of the Department of Public Works. (Trans.—pp. 1704:21-1705:3).

[5] Stewart was the Public Works representative in the County Attorney's office and, in effect, "represented" the Public Works Department in legal matters. (Trans.—pp. 1302:23-25; 1303:22-24; 1405:18-21; 1703:9-15).

hostile work environment existed at Big Creek and that Parker's and Glass' complaints of racial harassment had not been addressed adequately. (Trans.—pp. 508:8-15; 1202:22-1203:14; DE#144-145; 1205:12-17; 1206:8-10; 1278:6-7).

Regus reviews the situation and acts. On May 14, 1996, Regus received Bockman's final report on the situation at Big Creek, and on May 17, 1996, he received Bockman's supplemental report, including a copy of Acey's memorandum and Respondents' written responses to Cooper's report. (Trans.—pp. 1326:12-1327:5; PE#39; 1330:24-1331:11; PE#118; 1610:12-14). After reviewing Bockman's report and Respondents' responses to Cooper's April 29 report, Regus was critical of Cooper's final report. (Trans.—p. 1705:16-18). Specifically, Regus believed that Cooper had deliberately excluded certain relevant facts. (Trans.—pp. 1657:11-14; PE#8; 1657:23-1658:15). According to Cooper, he did not include these facts because he felt that they were inadequate and ineffective to address the racial harassment at Big Creek. (Trans.—p. 1592:10-23).

Meeting regarding Big Creek. On May 15, 1996, Regus met with Deputy County Manager Sheila Pierce, Personnel Director Bob Brandes, Bockman, Cooper and County Attorney Forsling to discuss Big Creek and the results of Cooper's and Bockman's investigations. (Trans.—pp. 1337:9-17; 1341:5-10; 1695:14-19). The meeting was contentious, and both Cooper and Bockman were defensive of their respective reports. (Trans.—pp. 1694:1694:5-9; 1739:15-1740:5). At one point, Cooper told Bockman that he was looking at the situation at Big Creek from a white man's perspective and that he should look at it from the perspective of a black man who has had to work for a white man all his life. (Trans.—p. 1544:7-12). Although Regus viewed Cooper's conduct as being unprofessional, rude and accusatory, he did not view the comments as demonstrating any racial bias on Cooper's part. (Trans.—pp. 1665:23-

1667:8). Rather, Regus believed that Cooper was asking Bockman to understand him. (Trans.—p. 1667:1-4). Brandes felt that Cooper was "trying to protect his turf, trying to protect the integrity of what he thought was his work product," and was not expressing bias against whites. (Trans.—p. 1741:7-9, 14-16). Cooper testified that he made the statement because Bockman was focusing on his apparent belief that Parker and Glass were "drug dealers" rather than the fears of the African American employees at Big Creek. (Trans.—p. 1544:12-22).[6]

Regus' decision to discipline Respondents. Because Regus criticized Cooper's report and felt that it was incomplete, he put it aside and did not rely on it in disciplining Respondents. (Trans.—pp. 1417:23-1418:1; 1694:10-11; 1723:16-20). Instead, Regus relied on Bockman's report and tape-recorded interviews from Cooper's investigation. (Trans.—p. 1694:12-22). After reviewing this evidence, Regus determined that a hostile environment existed at Big Creek and that Respondents failed to take all necessary measures to stop the harassment. (Trans.—p. 1710:19-25). The next day, Regus met with Brandes and Forsling, but not Cooper, to determine the specifics of Respondents' discipline. (Trans.—pp. 1742:5-9, 13-22; 1743:16-1744:7). Brandes then helped Regus prepare Respondents' disciplinary letters. (Trans.—pp. 1744:17-19).

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[6] Specifically, Cooper believed that Bockman was focusing too much on a June 1995 incident in which Glass told Mowrey and Heath that Parker and Barry Woodall (white) had asked him to help them buy drugs to plant in Heath's truck. (Trans.—pp. 239:5-9, 21-25; 586:20-25; 756:16-757:1). In response to Glass' report, Mowrey and Heath had met with the police, but did not otherwise investigate the allegations. (Trans.—pp. 340:25-341:14; 890:9-11). Mowrey did not question Parker or Woodall about the allegations, and Bockman did not discipline either employee. (Trans.—pp. 345:15-23; 1360:12-18).

Respondents admitted at trial that a hostile work environment existed at Big Creek. (Trans.—pp. 453:17-19; 689:7-9; 931:9-11; 935:14-17). Respondents also admitted that between August 1996 and March 1996, whatever steps they took to end the racial harassment at Big Creek were ineffective. (Trans.—pp. 455:13-16; 463:2-8; 688:24-689:2; 719:24-720:5; 935:14-936:3). In fact, Lambert and Heath testified that aside from their opinions that Regus' conclusions were wrong, the discipline letters he issued to them were factually accurate. (Trans.—pp. 699:12-14; 936:15-23).

D. DISCIPLINE

Discipline of Respondents. By letters dated May 16, 1996, Respondents were disciplined for failing to effectively deal with the situation at Big Creek. (Trans.—pp. 318:24-319:7; PE#3; 566:23-567:1; PE#1; 1614:18-22; 1633:18-24; 828:22-25; PE#5). Lambert was discharged. (Trans.—PE#1). Mowrey was suspended for five days and demoted, with no resulting decrease in pay. (Trans.—pp. 233:17-20; 461:23-25; 515:2-4; 1661:22-23). Heath was demoted, with no resulting decrease in pay. (Trans.—pp. 1661:13-21; 829:4-9).

Regus did not consider disciplining Acey because she was not a part of the chain of command and, accordingly, did not have line responsibilities at Big Creek. (Trans.—pp. 1615:9-21). Neither Brown (African American) nor Collett (white), frontline supervisors at Big Creek, were disciplined. (Trans.—pp. 334:9-12; 431:9-23; 686:16-20).[7]

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[7] Although Cooper, through Belle, learned during his investigation that Brown had not reported drug use and weapons violations by Big Creek employees, Regus did not discipline Brown for this because that information was not in Bockman's report and Regus did not learn about Brown's inaction until trial. (Trans.—pp. 1579:10-22; 1580:6-22; 1581:13-23; 1582:12-19; 1617:16-1618:8; 1619:22-23).

Discipline of Cooper. On May 23, 1996, Regus reprimanded Cooper in writing for his actions during the May 15, 1996, meeting, the manner in which he investigated the allegations at Big Creek, his final report and for forwarding the statement of position to the EEOC without reconciling the apparent conflicts between it and his report. (Trans.—pp. 1521:9-13; 1523:5-7; 1536:12-19; PE#8). Regus did not discipline Cooper in connection with the hostile work environment at Big Creek because it was not in his department and, accordingly, he was not charged with maintaining or remedying the work environment. (Trans.—pp. 1614:23-1615:8).

Personnel Board's review of Respondents' discipline. Respondents appealed their discipline to the Fulton County Personnel Board. (Trans.—pp. 326:17-327:3). The Personnel Board, which was comprised of three citizens with no connection to Big Creek, found that the discipline imposed against Respondents was clearly job related, but reduced Respondents' discipline to 30-day suspensions. (Trans.—pp. 327:4-8; 464:8-14; 465:3-6; 465:22-466:23; DE#155; 572:8-10, 16-20; 713:10-14; DE#154; 832:19-25; PE#6; 834:14-17).

E. RESPONDENTS' RACE DISCRIMINATION CLAIMS

Respondents believe that race was a factor in their discipline because Regus disciplined white individuals (Respondents) but did not discipline Brown or Acey. (Trans.—pp. 468:11-15; 707:6-9; 916:21-917:1). Lambert and Mowrey testified, however, that Brown was a Sewer Supervisor under Heath and was never in charge of the investigation into the incidents of racial harassment at Big Creek. (Trans.—pp. 468:24-469:7; 707:10-12). Furthermore, Lambert admits that Acey was not in charge of the investigation into the incidents at Big Creek, and Mowrey testified that he and Acey had different job responsibilities altogether. (Trans.—pp. 470:4-12; 707:13-15). Acey testi-

fied that she has never worked at Big Creek, nor has she ever been responsible for the employees who work there, and that her job is totally different from those of Respondents. (Trans.—pp. 1182:20-1183:3; 1183:24-1184:2; 1186:18-23; 1187:1-15; 1192:4-13).

F. PROCEEDINGS BELOW

On May 1, 1997, Respondents filed this action against Petitioners in the United States District Court for the Northern District of Georgia, Atlanta Division. Petitioners alleged that Respondents imposed disparate discipline against them on the basis of their race (white), in violation of, *inter alia*, 42 U.S.C. § 2000e ("Title VII"), the Fourteenth Amendment to the United States Constitution (through 42 U.S.C. § 1983) and 42 U.S.C. § 1981. Subject matter jurisdiction in the district court was premised upon 28 U.S.C. § 1331. The case proceeded to trial before a jury in April and May 2000 on the Title VII race discrimination claims against Fulton County, and the Section 1981 and 1983 race discrimination claims against Regus and Cooper in their individual capacities.

After the close of Respondents' case-in-chief, Petitioners moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a), which the court denied. At the close of all the evidence, Petitioners moved the court not to strip Regus and Cooper of qualified immunity and for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a). The court denied Petitioners' Rule 50(a) motion, but reserved ruling on the question of qualified immunity pending the jury's responses to special interrogatories.

On May 5, 2000, the jury returned a verdict for Respondents, and awarded each back pay and compensatory damages against Fulton County on the Title VII claims, and compensatory and punitive damages against Regus and Cooper on the Section 1981 and 1983 claims. Petitioners again asked the court to rule on their motion to assert the qualified

immunity defense on behalf of Regus and Cooper and for judgment as a matter of law as to the award of punitive damages. The court denied Petitioners' motion as to qualified immunity in light of the jury's verdict and reserved ruling on the punitive damages issue pending the parties' submission of briefs. (Trans.—p. 1890:4-9). In their brief, Petitioners again argued that Cooper and Acey were not proper comparators to Respondents, and that the district court erred in allowing the jury to consider them as comparators, because neither had the same job responsibilities as Respondents, was in Respondents' chain of command or engaged in nearly identical conduct to Respondents.

On May 25, 2000, the district court denied Petitioners' motion for judgment as a matter of law as to punitive damages. In its order, the district court rejected Petitioners argument that the jury was not entitled to consider Cooper as a comparator to Respondents for disparate treatment purposes. The court held that "It was, and is, the Court's view that nearly identical conduct is not the only standard for making a comparison in a disparate discipline case. This case is a good example of the necessity for a 'comparable seriousness' standard." (App., p. 22a). On June 13, 2000, Petitioners timely renewed their motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b). In its order denying Petitioners' motion, the district court stated

> Defendants again argue that the Court erred in charging that the jury could compare other employees whose misconduct was "nearly identical or of comparable seriousness." It appears that the Court charged the jury more favorably to Defendants than it should have in light of the recent decision of the Eleventh Circuit in *Alexander v. Fulton County*, 207 F.3d 1303, 1333 (11th Cir. 2000).

(App., pp. 18a-19a). Accordingly, the district court entered its Amended Judgment in accordance with the jury's verdict on July 19, 2000. (Appendix E).

Petitioners timely appealed to the Eleventh Circuit Court of Appeals. On June 6, 2001, the Court of Appeals entered an Order affirming the judgment of the district court in its entirety. (Appendix B). In its decision, the court of appeals noted that Acey and Cooper were responsible for investigating claims of racial harassment and were not in the chain of command at the Big Creek facility. The court nevertheless cited as evidence of disparate treatment sufficient to support the jury's verdict that Acey was not disciplined[8] and that Cooper was disciplined less severely than Respondents. (App., pp. 11a-12a). As to the qualified immunity issue, the court of appeals accepted the district court's decision to strip Regus and Cooper of qualified immunity based solely upon the jury's determination that Regus and Cooper intentionally discriminated against Respondents. (App., p. 15a). Petitioners timely sought Rehearing En Banc, which request was denied on January 17, 2002. (Appendix A).

REASONS FOR GRANTING THE WRIT

For two reasons, certiorari should be granted to review the Eleventh Circuit's affirmance of the district court's judgment. *First*, there is a conflict among the courts of appeal as to the standard for a proper comparator in disparate discipline employment discrimination cases. In this case, the district court applied a "comparable seriousness" standard in determining that Cooper and Acey, who were not in the Public Works Department's chain of command and were not responsible for maintaining the work environment at Big Creek, were proper comparators to Respondents, who *were* responsible for the work environment at Big Creek. Other courts of appeal (including other panels of the Eleventh Circuit), however, have applied the far more stringent "nearly

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[8] There was no record evidence at trial and none cited by the court of appeals to suggest that Acey had engaged in any wrongdoing in connection with the Big Creek situation.

identical" standard to determine whether an employee is a proper comparator in the disparate discipline analysis. Moreover, other courts of appeal also have considered factors such as relative job responsibilities and record of discipline of the purported comparator, in addition to the nature and seriousness of the alleged misconduct, in determining whether an employee is a proper comparator to the plaintiff. As a result of this conflict, employment discrimination litigants in different judicial circuits will receive different outcomes under identical facts.

Second, in upholding the district court's decision to strip Regus and Cooper of qualified immunity, the Eleventh Circuit deviated from the relevant decisions of this Court as to the applicability of qualified immunity. While the district court purported to evaluate the two prongs of the qualified immunity analysis employed by this Court, the court's own opinion makes clear that its determination that Regus and Cooper violated clearly established law was premised entirely upon the jury's conclusion that Regus and Cooper intentionally discriminated against Respondents. The court thus abdicated its duty to decide qualified immunity as an issue of law and instead allowed the jury to resolve the issue. In addition, the evidence considered by the jury was wholly insufficient to support a finding that Regus and Cooper violated clearly established law as would permit the court to strip them of qualified immunity.

I. Certiorari Should Be Granted To Resolve A Conflict Among The Courts Of Appeal As To The Standard For Proper Comparators In Disparate Discipline Discrimination Cases.

In *McDonald v. Santa Fe Transportation Company*, 427 U.S. 273, 283-84 (1976), this Court held that a plaintiff may present, as circumstantial evidence of pretext in a disparate treatment case, evidence that he engaged in acts of "com-

parable seriousness" to those of a non-protected employee, yet was disciplined more severely. That case, however, presented a straightforward fact pattern in which three rank-and-file transportation employees all were involved in the same scheme to misappropriate company property. Because the two white employees were discharged, while the non-white employee was retained despite engaging in identical conduct, this Court held that the white employees could rely on the difference in treatment as circumstantial evidence of race-based discrimination. *Id.*

Not every case, however, presents the straightforward fact pattern found in *McDonald*. Perhaps as a result, the courts of appeal (and even panels within courts of appeal) have applied a wide variety of standards for proper comparators in disparate discipline employment discrimination cases. For example:

- In the Sixth Circuit, the court required a plaintiff to identify a comparator who was "similarly situated in all respects" but did not identify in what "respects" similarity was required. The court further held that the misconduct at issue must be the "same conduct without such differentiating or mitigative circumstances that would distinguish their conduct." *Clayton v. Meijer, Inc.*, No. 00-1970, 2002 U.S. App. LEXIS 2887, at *8-*10 (6th Cir., Feb. 26, 2002).
- In the Fifth Circuit, the court required a plaintiff to show that "the misconduct for which she was discharged was nearly identical to that engaged in by an employee not within her protected class whom the company retained." In other words, the court held, "the conduct is not nearly identical when the difference between the plaintiff's conduct and that of those alleged to be similarly situated accounts for the difference in treatment received from the employer." *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 221 (5th Cir. 2001).

- In the Eighth Circuit, the court required a plaintiff to show that she was "involved in or accused of the same offense" as a male comparator *and* that the discipline decisions were made by the same decision-makers. *Britton v. City of Poplar Bluff*, 244 F.3d 994, 998 (8th Cir. 2001).
- In the Seventh Circuit, the court required a plaintiff to point to a non-protected comparator who received preferential treatment who was "similarly situated in all respects," but did not define the term "respects." The court further held that the comparator must have engaged in misconduct of "comparable seriousness." *Spath v. Hayes Wheels Int'l*, 211 F.3d 392, 396 (7th Cir. 2000).
- In the Second Circuit, the court required a plaintiff to show only that his misconduct was of "comparable seriousness" to that of the non-protected comparator, but also required that the comparator be "subject to the same performance evaluation and discipline standards." *Graham v. Long Island R.R.*, 230 F.3d 34, 39-40 (2d Cir. 2000).
- In the Tenth Circuit, the court rejected a plaintiff's disparate treatment argument, holding that the purported comparator was not similarly situated even though he committed a similar offense because he was one of the plaintiff's supervisors. *Jones v. Denver Post Corp.*, 203 F.3d 748, 753 (10th Cir. 2000).
- In the First Circuit, the court required a plaintiff to show that his case and the comparator's case "must closely resemble one another in respect to relevant facts and circumstances." *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 20 (1st Cir. 1999).
- In the Federal Circuit, the court required a plaintiff to show that "all of the relevant aspects of her employment situation were nearly identical to those" of the non-protected comparator. Accordingly, plaintiff could not rely on a male comparator who was less senior in

position than plaintiff and who was criticized for different work practices than plaintiff. *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995).

This divergence of standards is further demonstrated by decisions issued by separate panels within the Eleventh Circuit Court of Appeals around the time of the *Lambert* decision in the conflicting opinions of *Anderson v. WBMG-42*, 253 F.3d 561, 565 (11th Cir. 2001) (*citing Alexander v. Fulton County*, 207 F.3d 1303, 1333-34 (11th Cir. 2000) (Before Anderson, Chief Judge, Marcus, Circuit Judge, and Hancock, Senior District Judge)) (Before Barkett, Hill and Kravitch, Circuit Judges) and *Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S. Ct. 402 (2001) (Before Carnes and Roney, Circuit Judges, and O'Kelley, District Judge). In *Anderson* and *Alexander*, the two separate panels defined a proper comparator as any employee who engaged in "similar" conduct and was treated more favorably. *See Anderson*, 253 F.3d at 565, and *Alexander*, 207 F.3d at 1333. By contrast, the *Silvera* panel defined a proper comparator as any employee who engaged in "nearly identical" conduct and was treated more favorably. *Silvera*, 244 F.3d at 1259.[9]

In the instant case, the court permitted the jury to consider the treatment of Acey and Cooper as evidence of disparate treatment if they found Acey or Cooper to have engaged in misconduct that was "nearly identical or of comparable seriousness" to Respondents. (App., pp. 18a-19a). The factual predicate for this comparison does not exist. It was undisputed at trial that neither Acey nor Cooper were in the

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[9] In fact, the *Anderson* and *Alexander* panels *explicitly rejected* the "nearly identical" standard applied in the *Silvera* decision by another panel of the Eleventh Circuit during the same time period. *Compare Anderson*, 253 F.3d at 565, and *Alexander*, 207 F.3d at 1333, *with Silvera*, 244 F.3d at 1259.

chain of command at the Big Creek facility or were charged with maintaining a non-discriminatory work environment. The court nevertheless permitted the jury to compare their conduct to that of Respondents simply because they participated in the Big Creek investigation. Had the court considered the requirements imposed in other judicial circuits that comparators be similarly situated in all relevant respects, such as having the same supervisor or being subject to the same performance evaluation standards, Petitioners would have prevailed, because the differences in supervisors and job duties and responsibilities were undisputed at trial. Morever, even if the court had only evaluated the nature of the misconduct (and not considered the other factors mentioned previously) using the more stringent "nearly identical standard" rather than the "comparable seriousness" standard, Petitioners would have prevailed, because it was undisputed at trial that Petitioners were disciplined for their inaction at Big Creek, while Cooper and Acey were charged only with investigating the Big Creek situation after the fact. In short, had this lawsuit been brought in another jurisdiction, Respondents' evidence would have been subject to more stringent standards, which would have compelled a favorable outcome for Petitioners.

A conflict among the courts of appeal in the application of an important—and common—question of employment discrimination law such as this one is precisely the type of issue certiorari review was intended to resolve. Sup. Ct. R. 10. Accordingly, Petitioners respectfully submit that the Petition should be granted so that the Court may identify and define the factors to be considered by lower courts in evaluating disparate discipline cases.

II. Certiorari Should Be Granted To Correct The Eleventh Circuit's Deviation From The Standard For Qualified Immunity Established By This Court.

As this Court has established, the affirmative defense of qualified immunity provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Only those individuals who are plainly incompetent or knowingly violate the law will be stripped of immunity. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Thus, in performing their duties, government officials are not required to err on the side of caution. *Davis v. Scherer*, 468 U.S. 183, 196 (1984).

Because it was uncontroverted at trial that Regus and Cooper each acted within the scope of his discretionary authority, the district court and court of appeals needed only to determine whether Respondents showed by a preponderance of the evidence that Regus' and Cooper's official acts violated law that was clearly established at the time they acted. *Evans v. Hightower*, 117 F.3d 1318, 1320 (11th Cir. 1997). In addition, because there was no factual dispute as to the actions taken by Regus and Cooper in their discretionary authority (*e.g.*, Regus disciplined Respondents; Cooper included incomplete and erroneous information in his report) and even Respondents agreed that Regus' disciplinary letters were factually accurate, the court should have decided the qualified immunity issue as a matter of law. *See, e.g., Hunter v. Bryant*, 502 U.S. 224, 227-28 (1991) (issue of qualified immunity should be decided by the court, and not submitted to the jury). In upholding the district court's decision, the court of appeals explicitly approved of this practice, citing only to its decision in another qualified immunity case.

(App., p. 15a) (*citing Alexander*, and holding that the district court properly denied Regus and Cooper qualified immunity on the basis of the jury's determination by special interrogatory that Regus and Cooper intentionally discriminated against Respondents). Because the court of appeals clearly deviated from the well-settled qualified immunity standards established by the relevant decisions of this Court, certiorari should be granted and the holding of the court of appeals reversed.

Moreover, even if the qualified immunity question *were* theoretically permitted to be submitted to the jury, the court erred in denying Petitioners' motion for judgment as a matter of law as to qualified immunity because the undisputed evidence at trial demonstrated that Regus and Cooper did not violate clearly established law.

A. Defendant Regus

Respondents failed to produce any evidence that Regus disciplined them on the basis of their race. Instead, Regus testified that he disciplined Petitioners because they were the managers responsible for maintaining a healthy working environment at Big Creek but failed to adequately address the racially hostile environment that each Respondent acknowledged existed. Significantly, two of the Respondents conceded at trial that Regus' discipline letters were factually accurate, although Respondents disagreed with the conclusion that they should be disciplined. Because neither 42 U.S.C. § 1983 nor § 1981 are "fairness" statutes pursuant to which employees may recover for decisions with which they simply disagree, this testimony is in itself sufficient to neutralize Respondents' claims of illegal race discrimination.

As set forth previously, the "evidence" of race discrimination upon which Respondents relied was insufficient to raise a question as to whether Regus and Cooper violated the law. Regus explained the reasons for his disciplinary deci-

sions with respect to Cooper, Acey and Brown,[10] and Respondents did not offer any evidence to contradict his testimony. Regus also testified that he recognized the problems with Cooper's report and, as such, did not rely on it in determining whether and to what extent to discipline Respondents. This testimony was corroborated by Personnel Director Brandes.[11] Finally, three of the individuals present at the May 15 meeting (Regus, Cooper and Brandes) testified that in context, Cooper's comment to Bockman about seeing the situation from a black man's perspective clearly was intended to get Bockman to move off his position that Parker and Glass were drug dealers and instead focus on the hostile work environment that existed at Big Creek. Respondents, who were not present at the meeting, did not present any evidence to the contrary. In short, the evidence at trial showed that Regus acted reasonably given the facts presented to him and that he did not intentionally violate the law.

B. Defendant Cooper

Likewise, Cooper's conduct shows that he did not intentionally violate the law, and that he acted reasonably given the facts presented to him. That two independent bodies—the Personnel Board and the EEOC—concluded that a hostile working environment existed at Big Creek and that Respondents' discipline was job related supports the reasonableness of Cooper's conclusions. Thus, the conclusions reached by

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[10] Again, although Respondents point to evidence that Brown was aware of and did not report employees' use of drugs, alcohol and racial slurs, Regus' unrebutted testimony shows that he was unaware of this when he made his disciplinary decisions.

[11] In an effort to prove that Regus did rely on Cooper's report in disciplining them, Respondents focused heavily on the fact that Respondents were disciplined under those provisions of the Fulton County regulations that Cooper identified in his report. However, Brandes, who as Personnel Director is intimately knowledgeable about the regulations, testified that he assisted Regus in making this determination.

Cooper cannot support a finding that race motivated his investigation and report.[12]

First, as set forth previously, Cooper's comment at the May 15, 1996, meeting reflected his desire that Bockman view the situation from the perspective of the African American Big Creek employees. Second, although Cooper did not specifically direct Bockman's attention to the tape of Brown's interview (wherein he admitted knowledge of employees' use of drugs and racial slurs), Cooper testified that he did not do so because Brown told him he believed his hands were tied with respect to disciplining those employees and, thus, Cooper did not think that Brown himself should be disciplined. Therefore, given the facts available to Cooper at the time of his report, he acted reasonably and is entitled to qualified immunity.

Accordingly, because the court improperly allowed the question of qualified immunity to be answered by the jury when no factual disputes regarding Petitioners' conduct existed, and because the evidence supported a finding that Regus and Cooper acted reasonably based upon the facts known to them, the Court should grant the Petition and reverse the decision of the court of appeals.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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[12]Respondents also pointed to the fact that Cooper listed the race of the individuals in his report. This is simply a red herring which does not evidence racial bias given that Cooper's report dealt with complaints of racial harassment and, logically, included the races of the alleged victims, those in charge and those accused of the harassing conduct.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jan. 17, 2002]

No. 00-14272-AA

CHESTER L. LAMBERT, III, WILLIAM E. MOWREY, JAMES M. HEATH,
Plaintiffs-Appellees,

versus

FULTON COUNTY, GEORGIA, ROBERT J. REGUS, individually and in his official capacity as County Manager, MICHAEL G. COOPER, individually and in his official capacity as Director of the Fulton County Department of Contract Compliance and Equal Employment Opportunity,
Defendants-Appellants.

On Appeal from the United Stated District Court
for the Northern District of Georgia

On Petition(s) for Rehearing and Petition(s) for Rehearing En Banc (Opinion _____, 11th Cir., 19__, ____F.2d ____).

Before: BLACK and MARCUS, *Circuit Judges* and HANCOCK *, *District Judge.*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

Entered for the Court: /s/ [Illegible]
United States Circuit Judge

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* Honorable James H. Hancock, U.S. District Judge for the Northern District of Alabama, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed June 6, 2000]

No. 00-14272

CHESTER L. LAMBERT, III, WILLIAM E. MOWREY, *et. al.*,
Plaintiffs-Appellees,

v.

FULTON COUNTY, GEORGIA, ROBERT J. REGUS, *et. al.*,
Defendants-Appellants.

JUDGES: Before BLACK and MARCUS, *Circuit Judges*, and HANCOCK*, *District Judge*.

OPINION:

HANCOCK, *District Judge*:

Fulton County, Georgia appeals final jury verdicts awarding separately to three plaintiffs, Chester L. Lambert, William E. Mowrey, and James M. Heath, back pay and $300,000 compensatory damages on their separate Title VII claims against Fulton County asserting that disparate discipline was administered to them by Fulton County because they are white. Robert J. Regus appeals final jury verdicts awarding separately to the three plaintiffs $50,000 compensatory damages and $225,000 punitive damages on their respective 42 U.S.C. § 1983 claims against Regus asserting that Regus denied them their Fourteenth Amendment right to equal protection and their rights under

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* Honorable James H. Hancock, U.S. District Judge for the Northern District of Alabama, sitting by designation.

42 U.S.C. § 1981. Michael Cooper appeals final jury verdicts awarding separately to the three plaintiffs $50,000 compensatory damages and $ 225,000 punitive damages on their respective 42 U.S.C. § 1983 claims against Cooper asserting that Cooper denied them their Fourteenth Amendment right to equal protection and their rights under 42 U.S.C. § 1981.

Appellants Fulton County, Regus, and Cooper raise two common issues on appeal, sufficiency of the evidence to support each verdict and whether the district court erred in denying motions for a new trial. Appellants Regus and Cooper also raise two additional issues common to them, whether they were entitled to qualified immunity and whether the district court erred in denying their motions for judgment as a matter of law on the punitive damages claims or, alternatively, failing to reduce the amount of punitive damages awarded. Because there was sufficient evidence to support the several jury verdicts, including the amount awarded as punitive damages, and because Regus and Cooper were not entitled to qualified immunity, we affirm.

I. Factual Background

Appellants-Defendants are Fulton County, Georgia; Robert J. Regus, who at all relevant times was County Manager for Fulton County with supervisory authority over all employees of Fulton County; and Michael G. Cooper, who at all relevant times was Director of Fulton County's Department of Contract Compliance and Equal Employment Opportunity ("EEO office") with responsibility for investigating discrimination complaints and recommending corrective action. Cooper reported directly to Regus. At all relevant times, Appellees-Plaintiffs Chester Lambert, William Mowrey and James Heath were all employees of Fulton County working at the Big Creek Water Treatment Facility. As discussed below, Appellees alleged that the Appellants

unlawfully discriminated against them by disciplining them on the basis of their race (white). Regus is white; Cooper is black.

Appellee Lambert began his employment with Fulton County in 1975, and during 1995 and 1996, the relevant time frame for this case, he held the position of Civil Engineer III and was responsible for the North Fulton water system and maintenance. Appellee Mowrey began his employment with Fulton County in 1989 and in 1995 was Area Construction Supervisor, Operations Manager and was responsible for sewer lines in the South Fulton and North Fulton waste water treatment facilities. Appellee Heath began his employment with Fulton County in December of 1988, and in 1995 he became acting supervisor at Big Creek. By virtue of the positions they held, all Appellees were responsible for responding to employee complaints of racial harassment. In 1995, Lambert reported to Frank Bockman (the Deputy Director of the Department of Public Works), Mowrey reported to Lambert, and Heath reported to Mowrey.

The crux of Appellees' allegations is that race was a factor in the disciplining of Appellees for failing to effectively deal with a hostile work environment at Big Creek. The Appellees admitted at trial that a hostile work environment existed at Big Creek because of numerous racial incidents that occurred there in 1995 and 1996 which resulted in formal charges of discrimination being filed by two Big Creek employees on January 26, 1996 with the Equal Employment Opportunity Commission ("EEOC").[1] From March until May of 1996,

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[1] The incidents included the following. On August 21, 1995, a black employee at Big Creek, David Parker, complained by memorandum about supervisors using racial slurs to and about subordinate employees. On September 14, 1995, Parker found a notebook containing drawings of confederate flags, flames, a hangman's noose, a hooded Klansman figure, and racial slurs in a white crew leader's truck at Big Creek. On October 5, 1995, Parker reported that a racial slur had been written on a break room

Cooper and another Fulton County EEO office member were in charge of conducting an investigation on behalf of the EEO office and responding to the EEOC charges filed. Cooper conducted interviews and investigated the situation, and on April 29, 1996, submitted his first report to Regus. In that report, Cooper concluded that the Department of Public Works was guilty of allowing racial discrimination to occur and he recommended disciplining supervisors and management officials under Article 21 of the Fulton County Personnel Regulations. On May 1, 1996, the County Attorney for Fulton County issued a letter to Cooper and Regus criticizing Cooper's April 29 report as "replete with hearsay" and finding that no action could be taken on the basis of that report "without violating the rights of various employees of Fulton County." After reviewing the County Attorney's letter, Regus asked Cooper to provide another report to include names of the employees who were responsible for the racial harassment.

On May 3, 1996, Cooper submitted a revised report accusing six white employees, identified by race and name and including the three Appellees, of various policy violations including engaging in discrimination and allowing discrimination to continue in the Department of Public Works. Cooper's May 3 report recommended "immediate disciplinary action" but did not advocate that any particular

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wall at Big Creek. In January of 1996, two more racial slurs appeared on the break room wall and door at Big Creek. In early 1996, a black employee at Big Creek, Arthur Glass, complained that a white employee had referred to him as a "sorry ass black man." On January 26, 1996, Parker and Glass filed charges of discrimination with the EEOC. On February 16, 1996, another racial slur was found on the break room wall at Big Creek and on February 19, 1996, a letter and envelope containing racial slurs were found on Parker's county vehicle. On February 22, 1996, Parker and Glass found the brake lines on their county vehicles cut. Parker and Glass both reported to Curtis Brown (black), who was supervised by Heath.

individuals be disciplined. After "painstakingly analyzing" Cooper's May 3 report, Robert Regus, in a letter dated May 23, 1996, expressed concern that Cooper's "conclusions were not substantiated by facts, and efforts were not made to interview all persons who may have knowledge of the allegations." The May 23 letter also criticized Cooper's "conscious decision . . . to selectively include certain facts while excluding other facts" including "steps taken by Mr. Bockman and others to respond to complaints of racial harassment at Big Creek." Regus also expressed concern that Cooper behaved in an "unprofessional, rude, accusatory manner and demonstrated personal bias" when asked to defend his report during a meeting held on May 15, 1996 between Cooper, Regus, Bockman, and the County Attorney. During the course of that meeting, Cooper told Bockman that "he was looking at the situation from a white man's perspective and that he (Bockman) should look at it from the perspective of a black man who has had to work for a white man all of his life." The May 23 letter criticized Cooper for being "emotionally involved" and issued an official warning and reprimand to Cooper concerning the performance of his duties. Cooper was directed to complete a course of training in investigation and report writing. Cooper admitted at trial that he left out certain relevant facts, including the Appellees' written statements detailing their efforts to stop the hostile environment at Big Creek.[2] On the same day that Cooper

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[2] Appellees took the following measures to combat the hostile environment. Heath initiated documentation including a memorandum dated August 24, 1995 to Lambert responding to an employee's complaints about possible discrimination and memoranda dated March 12, 1996 and March 16, 1996 to Mowrey regarding the Big Creek situation. Lambert communicated with Mozell Acey (the Human Resources coordinator who reported to Bockman and interacted with the EEO office in responding to discrimination complaints) via memorandum dated February 16, 1996 and with Mowrey via memorandum dated February 22, 1996 regarding the two EEOC complaints filed in late January of 1996. In a memorandum to Acey dated February 28, 1996, Mowrey documented

submitted his May 3 report, Cooper filed a Position Statement on behalf of Fulton County in response to the charges filed on January 26, 1996 with the EEOC. The Position Statement stated that the Appellees "took all reasonable steps necessary to discover the perpetrators and to protect the Charging Party from any alleged racially hostile environment." Cooper agreed at trial that the Position Statement was contradictory to the accusations in his May 3 report.

From March until May of 1996, Bockman and Mozell Acey (black)[3] conducted a contemporaneous investigation into the incidents at Big Creek on behalf of the Department of Public Works. Bockman and Acey interviewed all relevant witnesses and held meetings with employees to instruct them not to engage in racial or other harassment and to report harassment to management. The investigation did not conclusively reveal who was responsible for the racial harassment. Acey completed a report and expressed concern that managers and supervisors had no clear guidelines for handling an inflammatory situation; Acey recommended training for all employees on workplace diversity. Acey did

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the sequence of events leading up to the filing of the EEOC charges. Heath copied and preserved the notebook with the drawings and racial slurs, contacted the police about the situation, and turned the notebook over to the police for investigation after he had Bockman and Acey review it. Heath and Mowrey obtained written statements from employees who admitted to writing in the notebook and subsequently took disciplinary action against those employees. Mowrey, Heath, and Lambert wrote chronologies documenting the racial incidents at Big Creek. Mowrey and Heath, following Lambert's orders, conducted meetings with the Big Creek employees several times a week to discuss employee concerns about the environment at Big Creek. Heath and Mowrey also requested surveillance cameras and security fences and monitored the premises at night.

[3] As noted earlier, Acey was the Human Resources Coordinator who reported to Bockman and interacted with the EEO office in responding to discrimination complaints.

not find fault with the Appellees' actions and did not recommend disciplinary action. After reviewing Acey's findings, Regus directed Bockman to prepare a report and with the help of Acey, Bockman submitted a report on May 14, 1996 containing documentation of his investigation and the Appellees' responses to the racial incidents. Bockman's report catalogued evidence refuting Cooper's allegations, criticized both of Cooper's reports, and requested that Cooper withdraw his May 3 memorandum. Bockman's report expressed concern about Cooper's "false accusations" and found no fault on the part of the Appellees.

On May 13, 1996, Regus forwarded Cooper's May 3 report to the Fulton County Board of Commissioners and stated that he had "reviewed" the memorandum with the County Attorney, but Regus did not comment on the substance of Cooper's report. Regus did not forward Bockman's report to the Board. Regus informed the Commissioners that the media had requested a copy of the report and that at 5:00 p.m. on May 13, Cooper's report would be released to Channel 2 in accordance with provisions of the Open Records Act. The Appellees were allowed to submit written responses to Cooper's final May 3 report. On May 17, 1996, Bockman forwarded to Regus responses from Mowrey, Heath, and Lambert in order to "make certain Regus was aware of their responses."[4]

By letters from Regus dated May 16, 1996, Appellees were disciplined for failing to effectively deal with the situation at Big Creek as follows: Lambert was discharged; Mowrey was suspended for five days and demoted to Construction Inspector, with no resulting pay decrease; Heath was demoted to Sewer System Worker 2, with no resulting pay decrease. A May 17, 1996 inter-office memorandum from Regus to

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[4] These responses were forwarded by Bockman the day after Regus imposed subject discipline on Appellees.

Bockman documented that Bockman refused to take any disciplinary action against Lambert, Heath, or Mowrey, refused to sign the disciplinary letters dated May 16, 1996, and recommended only supervisory training for Lambert, Heath, and Mowrey.[5] Regus testified that he did not rely on Cooper's report in determining the disciplinary action to be taken against Appellees and stated that he knew that Cooper's report was replete with inaccuracies and that Cooper himself was "biased." In disciplining Appellees, Regus followed the same County disciplinary policies that Cooper recommended; Regus had not previously used those policies in his career as County Manager. Appellees appealed their discipline to the Fulton County Personnel Board and the board found that the discipline imposed against the Appellees was job-related, but they reduced the Appellees' discipline to 30-day suspensions.

The Chairman of the Board of Commissioners testified that he told the media that any County supervisors who did not take action on the EEOC complaints should be fired. The Chairman testified that the Board was concerned about the media attention and pressured Regus to act on the charges. Cooper also spoke to the media on a television news program and informed the public that, "make no mistake about it," supervisors and managers would be disciplined. Regus issued a press release on May 17, 1996 that stated in pertinent part, "After receiving a report for Mr. Michael Cooper . . . and after having received a response from Mr. Frank Bockman . . ., I convened a meeting on May 15, 1996 . . . to discuss the allegations. . . . As a result of that meeting, I have taken steps to initiate disciplinary action against three supervisory employees in the Public Works Department."

Appellees alleged that Regus disciplined white individuals (Lambert, Mowrey, and Heath) in the chain of command

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[5] Bockman agreed to discipline two other non-supervisory employees who were found to be responsible for some of the racial incidents.

while not disciplining black individuals (Curtis Brown and Mozell Acey). Appellants contend that the Appellees were due to be disciplined because they did not take all reasonable steps necessary to end the hostile environment at Big Creek and that Brown and Acey were not due to be disciplined because Brown was a sewer supervisor and was never in charge of the discrimination investigation at Big Creek and Acey was not in charge of the investigation nor responsible for the employees who work there.

After narrowing the claims down to the Title VII allegations against Fulton County and the Sections 1981 and 1983 claims against Regus and Cooper, the case was tried to a jury for two weeks. During the Appellees' case-in-chief, portions of a witness's deposition (Josh Kenyon) were read that had been objected-to by Appellants before the trial and excluded in a ruling *in limine*; Appellants again objected to the testimony and moved for a mistrial which the court denied. During Appellees' cross-examination of Regus, counsel for Appellees sought to introduce the criminal record of Arthur Glass (a witness) and openly provided opposing counsel with a copy of the record in the presence of the jury and before the court sustained Appellants' objection to its introduction. After the close of Appellees' case-in-chief, Appellants moved for judgment as a matter of law pursuant to Rule 50(a) which the court denied. At the close of all evidence, Appellants again moved for judgment as a matter of law and requested that Regus and Cooper be granted qualified immunity. The court largely denied the Rule 50(a) motion, but reserved ruling on that aspect of the motion based on qualified immunity. Prior to closing arguments, Appellants moved to dismiss the Appellees' punitive damages claims; the court agreed to take the motion under advisement but nonetheless charged the jury on punitive damages.

On May 5, 2000, the jury returned a verdict for Appellees. Against Fulton County, the jury awarded the Appellees back

pay in the amounts of $10,398.33 for Lambert, $4,204.00 for Mowrey, and $3,679.18 for Heath and compensatory damages in the amount of $425,000 for each Appellee. Against Regus, the jury awarded each Appellee compensatory damages in the amount of $50,000 and punitive damages in the amount of $225,000. Against Cooper, the jury awarded each Appellee compensatory damages of $50,000 and punitive damages of $225,000. After the jury was excused, Appellants asked the court to rule on the qualified immunity motion, which the court denied; Appellants also asked the court to rule on the punitive damages dismissal motion, on which the court again reserved ruling. The court denied Appellants' motion to dismiss the punitive damages award, declined to reduce the punitive damages award,[6] and entered final judgment on May 30, 2000.

On June 13, 2000, Appellants timely renewed their motion for judgment as a matter of law and alternatively, moved for a new trial. The court denied the motions and entered judgment in accordance with the jury's verdict on July 19, 2000. These appeals ensued.

II. Sufficiency of the Evidence

We review *de novo* the district court's denial of the Appellants' motions for judgment as a matter of law on the issue of sufficiency of the evidence to support the jury's verdicts, applying the same standard as the district court. *See Montgomery v. Noga*, 168 F.3d 1282, 1289 (11th Cir.1999). In applying that standard, "we review the evidence 'in the light most favorable to, and with all reasonable inferences drawn in favor of, the nonmoving party.'" *Montgomery*, 168 F.3d at 1289 (quoting *Walker v. NationsBank of Fla., N.A.*, 53 F.3d 1548, 1555 (11th Cir.1995)). We will not second-guess

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[6] Although the court did reduce the $425,000 compensatory damages award against Fulton County for each Appellee to $300,000.

the jury or substitute our judgment for its judgment if its verdict is supported by sufficient evidence. *See Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 582 (11th Cir. 2000).

Appellants argue that the jury's verdict should be reversed because it was not supported by the evidence. After a careful review of the record, we find that there was sufficient evidence to support the jury verdicts as to all three Appellants. There was ample evidence for the jury to conclude that the conduct of Cooper was motivated by a racially evil motive or intent. Cooper conducted a several month investigation so that a statement could be submitted to the EEOC responding to the charges filed by the two Big Creek employees. The County Attorneys told Regus that Cooper's report of his investigation was totally insufficient to justify Cooper's recommendation that discipline be imposed on unnamed supervisors. Regus asked Cooper for another report that, when submitted, accused six white employees, including plaintiffs, of engaging in racist discrimination and allowing it to continue. Regus also had in his possession a report prepared by Bockman, assisted by Acey, that catalogued evidence refuting Cooper's allegations, expressed concern about Cooper's "false accusations" and found no fault on the part of Appellees. Regus was aware that Cooper was emotionally involved in the investigation and that his revised report was based on a poorly conducted investigation which reached conclusions that were not supported by facts and which were the result of a conscious decision by Cooper to color the facts to support the conclusion that Cooper desired. However, despite Bockman's support of plaintiffs and Bockman's refusal to discipline plaintiffs himself, Regus chose to personally find fault on the part of plaintiffs and personally sign plaintiffs disciplinary letters. At the same time, Regus treated similarly situated black employees,

namely Acey and Brown,[7] more leniently than the white plaintiffs and imposed no real discipline on Cooper even though Cooper's misconduct, unlike that of plaintiffs, was willful. Regus supplied the County Commission with a copy of Cooper's report three days before he imposed discipline on plaintiffs but failed to provide the Commission with a copy of Bockman's report. Although Regus testified that he did not rely on Cooper's report in disciplining plaintiffs, the jury could easily have disbelieved that testimony and found that, throughout the process, Regus knowingly and intentionally endorsed Cooper's discriminatory acts.

Not only was there sufficient evidence to support the jury verdicts, but the record also clearly reflects that the jury's attention to critical elements of Appellees' claims was focused by a series of special interrogatories in the verdict form addressing separately each Appellee's claims against each Appellant. Among other matters, the jury expressly found by their answers, (a) that Regus and Cooper intentionally discriminated against each Appellee in the terms or conditions of his employment based upon the race of each Appellee, (b) that each Appellee should recover from Regus and from Cooper $50,000 compensatory damages and $225,000 punitive damages, (c) that Regus and Cooper each acted with malice or reckless indifference to each Appellee's federally protected rights, and (d) that the race of each Appellee was a substantial or motivating factor which prompted Fulton County to discipline each Appellee.

III. Motions for New Trial

The standard of review for a district court's disposition of a motion for new trial is abuse of discretion. *See McWhorter v.*

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[7] Curtis Brown was the immediate supervisor of the two Big Creek employees who filed the charges with the EEOC. His immediate supervisor was Appellant Heath.

City of Birmingham, 906 F.2d 674, 677 (11th Cir.1990). Appellants in this case argue that the district court erred by not granting their motions for new trial because the district court admitted evidence of media coverage; because the district court failed to declare a mistrial following the improper reading of previously excluded portions of the deposition testimony of Josh Kenyon; and because of misconduct of Appellees' counsel in the form of (a) reading the previously excluded portion of Kenyon's deposition and, (b) openly providing opposing counsel a record of a prior conviction of a witness (Arthur Glass, Jr.) before the court sustained the objection raised by counsel for Appellants.[8] The district court had considerable discretion under Fed.R.Evid. 403 to balance probative value and unfair prejudice when deciding whether to receive into evidence (1) articles from a local newspaper about the Big Creek charges and the disciplining of Appellees, and (2) a portion of a local television investigative newscast. *See United States v. Gilliard*, 133 F.3d 809, 815 (11th Cir. 1998). The newspaper articles and the television newscast were a foreseeable consequence of Appellants' behavior and were certainly relevant to the issue of compensatory damages. At least two of the Appellees testified that the articles humiliated them. The fact that Appellants played no role in the preparation or dissemination of the articles does not render them irrelevant,

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[8] Appellants also argue that a new trial should be granted because the jury's verdict was against the weight of the evidence, *see* discussion *supra* Part II, and because the punitive damages awards were excessive, *see* discussion *infra* Part V. Finally, Appellants argue that a new trial should be granted because of newly discovered evidence in the form of the post-trial guilty plea by Kenyon to a crime of dishonesty that would have been admissible under Fed.R.Evid. 609(a). To this argument, we need only note the former Fifth Circuit's decision in *NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 365 (5th Cir. 1978) (holding that "new evidence" discovered after trial does not warrant a new trial when its only purpose would be to impeach a witness).

unfairly prejudicial, confusing, or likely to mislead the jury. *See* Fed.R.Evid. 403. Further, we are unpersuaded that Appellants were unfairly prejudiced when the district court did not require or permit the jury to see the portion of the television newscast containing an interview of Terry Adams. The newscast contained interviews of several persons, but Appellees did not offer the portion containing the Adams interview; because "the rule of completeness" embodied in Fed.R.Evid. 106 does not extend to a different interview of a different witness, the district court did not abuse its discretion in admitting only a portion of that newscast. With respect to Kenyon's deposition testimony and the "Arthur Glass" incident, we stress that (1) the district court acted promptly to inform the jury to ignore the offending Kenyon testimony, (2) Kenyon was not a critical witness, (3) the Kenyon testimony did not concern Cooper's conduct in this particular case, and (4) the district court was in a far better position than we are to evaluate possible prejudice from the courtroom behavior of counsel for Appellees during the "Arthur Glass" incident. After having considered these arguments both singularly and collectively, we find that they do not rise to the level of abuse of discretion in this case.

IV. Qualified Immunity

We review *de novo* the denial of qualified immunity. *See Jordan v. Doe*, 38 F.3d 1559, 1563 (11th Cir.1994). "Qualified immunity protects government officials performing discretionary functions from civil trials (and the other burdens of litigation, including discovery) and from liability if their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Lassiter v. Alabama A & M Univ., Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir.1994) (*en banc*) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 409 (1982)). In analyzing the affirmative defense of qualified immunity, we first consider

whether Regus and Cooper were acting within the scope of their discretionary authority when the disciplinary decisions at issue were made. *See Evans v. Hightower*, 117 F.3d 1318, 1320 (11th Cir.1997). On this record, it is undisputed that they were. Thus, to eliminate the defense of qualified immunity, Appellees have the burden to demonstrate that the wrongful acts by Regus and Cooper violated clearly established law based upon objective standards. *See id.* Appellees have clearly met this burden since there can be no doubt that at the time of the operative facts in this case, it was clearly established by binding precedent in this circuit that intentional discrimination by a state actor in the workplace on account of race violated the Fourteenth Amendment. *See Smith v. Lomax*, 45 F.3d 402, 407 (11th Cir.1995); *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1064 (11th Cir. 1992) (holding that in 1989 it could hardly be argued that intentional discrimination in public employment did not violate the Fourteenth Amendment). By special interrogatory, the jury unequivocally determined that Regus and Cooper intentionally discriminated against Heath, Mowrey, and Lambert on the basis of race in the challenged employment decisions, and thus the district court properly denied the Appellants' motions for judgment as a matter of law on the issue of qualified immunity. *See Alexander v. Fulton County*, Ga., 207 F.3d 1303, 1321 (11th Cir. 2000).

V. Punitive Damages

Regus and Cooper's challenge to the sufficiency of evidence as to punitive damages is governed by Fed.R.Civ.P. 50. We review *de novo* the denial of Appellants' renewed motion for judgment as a matter of law on the issue of punitive damages. *See EEOC v. W&O, Inc.*, 213 F.3d 600, 610 (11th Cir. 2000). Applying the same standards as the district court, we "'consider whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a

matter of law.'" *Id.* (quoting *Combs v. Plantation Patterns*, 106 F.3d 1519, 1526 (11th Cir.1997)). We must "'consider all the evidence, and the inferences drawn therefrom, in the light most favorable to the nonmoving party.'" *Id.* (quoting *Combs*, 106 F.3d at 1526). "A jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640, 75 L. Ed. 2d 632, 651 (1983). *See Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534-538, 119 S. Ct. 2118, 2124-25, 144 L. Ed. 2d 494 (1999) (holding that the *Smith* standard for an award of punitive damages in an employment discrimination case is satisfied by a showing of either an evil intention to deprive a plaintiff of his federally protected rights or a conscious indifference to those rights). Where, as here, (1) there is no argument or evidence that Cooper or Regus genuinely believed that racial discrimination in the context of this case was permissible, and (2) there is ample evidence that both Regus and Cooper intentionally discriminated against Appellants because of their race, nothing more is required to support an award of punitive damages. *See Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1337-38 (11th Cir. 2000) (holding that defendant's knowledge that it is illegal to treat employees differently on account of race, coupled with credible evidence that defendant intentionally did so, is sufficient for a reasonable jury to conclude that the *Kolstad* standard for punitive damages has been satisfied). After considering all of the evidence and the jury's findings,[9] we conclude that the

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[9] In its answer to special interrogatories in the verdict form, after expressly finding that Regus and Cooper intentionally discriminated against each Appellee and acted with malice or reckless indifference to their federally protected rights, the jury concluded that each Appellee should recover from Fulton County lost wages of $10,398.33 (Lambert),

evidence is sufficient to support the jury's findings and an award of punitive damages in this case.

Appellants' also challenge the amount of punitive damages, which challenge is governed by Fed.R.Civ.P. 59(e). We "'will not overturn a denial of a Rule 59 motion absent an abuse of discretion.'" *W&O, Inc.*, 213 F.3d at 610 (quoting *Mays v. United States Postal Serv.*, 122 F.3d 43, 46 (11th Cir.1997)). In this case, the ratio of actual damages to punitive damages awarded for each Appellee against each Appellant is 4.5:1. Under the facts in this case, the punitive damage awards are not constitutionally excessive and we do not find that the district judge abused his discretion in denying Appellants' Rule 59 motion.

VI. Conclusion

Accordingly we affirm.

AFFIRMED.

$4,204.00 (Mowrey), and $3,679.18 (Heath) and compensatory damages of $ 425,000 (reduced to $300,000 by the judgment entered May 30, 2000).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed July 18, 2000]

Civil Action File
No. 1:97-CV-1243-TWT

CHESTER L. LAMBERT, III; WILLIAM E. MOWREY;
and JAMES M. HEATH,
Plaintiffs,

v.

FULTON COUNTY, GEORGIA, *et al.*,
Defendants.

ORDER

This is a race discrimination case. The jury found in favor of the Plaintiffs and the Court entered judgment in their favor. It is now before the Court on the Defendants' Renewed Motion for Judgment as a Matter of Law [Doc.144]. All of the issues raised but one have already been addressed many times. Defendants contend that they should be granted a new trial because one of the Plaintiffs' witnesses, Mr. Josh Kenyon, subsequently entered a plea of guilty to a public corruption charge. Mr. Kenyon's testimony was of marginal relevance and the Court is confident that it had no material effect upon the jury's decision as to liability or damages. The Defendants are not entitled to a new trial because they could have had additional material (entirely unrelated to this case) for impeachment if the trial had been held six months later. The Defendants again argue that the Court erred in charging that the jury could compare other employees whos

misconduct was "nearly identical or of comparable seriousness." It appears that the Court charged the jury more favorably to the Defendants than it should have in light of the recent decision of the Eleventh Circuit in *Alexander v. Fulton County*, 247 F.3d 1303, 1333 (11th Cir. 2000) ("Although susceptible to manipulation, the phrase 'similarly situated' is the correct term of art in employment discrimination law.") For the reasons stated in the Court's Order of May 30, 2000, the Defendants' Renewed Morton for Judgment as a Matter of Law [Doc. 144] is DENIED.

SO ORDERED, this 17 day of July, 2000.

/s/ Thomas W. Thrash, Jr.
THOMAS W. THRASH, JR.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

[Filed May 30, 2000]

Civil Action File
No. 1:97-CV-1243-TWT

CHRISTOPHER L. LAMBERT, III; WILLIAM E. MOWREY;
and JAMES M. HEATH,
Plaintiffs,

v.

FULTON COUNTY, GEORGIA, *et al.*,
Defendants.

May 25, 2000, Decided

Before W. THRASH, JR., *United States District Judge*.

ORDER

This is an employment discrimination case. The case was tried before a jury for two weeks. On May 5, 2000, the jury returned a verdict for the Plaintiffs. After the jury was discharged, the Court requested a conference with counsel prior to entry of judgment upon the verdict. The conference was held on May 16, 2000. The Court denied the Defendants' motion to dismiss the claims for punitive damages against Defendants Cooper and Regus. Counsel for all parties agreed that the issue of back pay under Title VII was submitted to the jury by agreement. Counsel for Plaintiffs agreed that the compensatory damage awards against Fulton County are

subject to Title VII's $300,000 per Plaintiff cap. The Court heard argument on the Defendants' claim that the punitive damages awards are excessive, and allowed both sides the opportunity to submit briefs on this issue. Having carefully considered the arguments of the parties, the Court directs the Clerk to enter judgment in favor of the Plaintiff and against Fulton County in the sum of $300,000 plus back pay for each Plaintiff and to enter judgment in favor of the Plaintiffs and against the Defendants Regus and Cooper for the sums awarded by the jury for compensatory and punitive damages.

DISCUSSION

A. MALICE OR RECKLESS INDIFFERENCE

In their brief, the Defendants again argue that the evidence does not authorize an award of punitive damages against Defendants Regus and Cooper. The jury having returned its verdict in favor of the Plaintiffs, the evidence must now be construed in their favor. To support a punitive damages award, a plaintiff must show that the defendant acted with malice or reckless indifference to the plaintiff's federally protected rights. *Reynolds v. CSX Transp., Inc.*, 115 F.3d 860, 869 (11th Cir. 1997) (citing 42 U.S.C. 1981(a)). Malice means "an intent to harm" and recklessness means "serious disregard for the consequences of [one's] actions." *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 476 (11th Cir. 1999); *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 491 (11th Cir.1996). The jury was entitled to conclude that Plaintiffs were made the scapegoats or sacrificial lambs for the situation at Big Creek and that they were singled out for punishment because of their race. Defendant Cooper recommended discipline for the Plaintiffs in reckless disregard for the truth of what happened at Big Creek and the Plaintiffs' efforts to deal with the situation. Defendant Regus acted upon Cooper's recommendation even after he became aware of the flaws in Cooper's report and failed to make any effort to remedy the public humiliation inflicted upon Plaintiffs due to the wide-

spread dissemination of Cooper's biased report. Construing the evidence in favor of the Plaintiffs as the Court must now do, the jury was entitled to conclude that the Defendants acted with reckless indifference to the Plaintiffs' federally protected rights.

In their brief, Defendants again argue that the jury was not entitled to consider Defendant Cooper as a proper comparator for disparate treatment purposes. In this connection, the Court charged the jury as follows:

> In comparing the nature of the offense at issue and the nature of the discipline imposed, the quantity and quality of the other employees' misconduct must be nearly identical or of comparable seriousness to prevent second-guessing of employers' reasonable decisions where there is no fair comparison of the employees and their alleged misconduct

The Defendants objected to the inclusion of the phrase "or of comparable seriousness." It was, and is, the Court's view that nearly identical conduct is not the only standard for making a comparison in a disparate discipline case. This case is a good example of the necessity for a "comparable seriousness" standard. The alleged misconduct of Plaintiffs and the alleged misconduct of Defendant Cooper were not nearly identical. They played very different roles in the County's response to the Big Creek situation. Nevertheless, the jury was entitled to conclude that Defendant Cooper's misconduct was much more serious than that of the Plaintiffs. The jury could have concluded that the Plaintiffs were guilty of some degree of negligence in not doing more to remedy the situation at Big Creek. On the other hand, the jury could have concluded that Defendant Cooper was guilty of intentionally slanting his report to justify his recommendation to discipline white supervisors while ignoring similar conduct by black employees. Nevertheless, he was given a letter of reprimand in private and lost no salary or position. The rule of applying

apples to apples must not be applied so mindlessly as to fail to see that sometimes the proper comparison is between apples and apple pie.

B. EXCESSIVENESS

The Defendants argue that the punitive damages awarded by the jury are "constitutionally excessive." (Defs. Brief, p. 10). Specifically, Defendants argue that an award of $675,000.00 against Regus and Cooper each violates the constitutional limits set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-86, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996) and *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1336-38 (11th Cir. 1999). There are a number of factors to consider in addressing this argument.

First, in BMW, the Supreme Court held that a court should consider the "disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award. *BMW*, 517 U.S. at 575. In following BMW, the Johansen court explained that "punitive damages must bear a 'reasonable relationship' to actual damages." *Johansen*, 170 F.3d at 1336. At the outset, the Court concludes that the proper comparison is not limited to the ratio between the lost wages award against Fulton County and the punitive damages award. The proper comparison is between the compensatory damage awards against Regus and Cooper and the punitive damage awards against those Defendants. The verdict awards each Plaintiff $50,000.00 in damages against each individual Defendant to "compensate for emotional pain and mental anguish." The ratio of actual damages to the actual punitive damages awarded for each Plaintiff against each Defendant (4.5:1) is well within, if not below, the constitutional limits regarding punitive damages. *See e.g., Steans v. Combined Ins. Co. of America*, 1998 U.S. Dist. LEXIS 7494, at *3 (S.D. Ala., Apr. 2, 1998) (refusing to award additional punitive damages against defendant where defendant had already paid punitive damages in a ratio to the compensatory damages of

125:1); *Hampton v. Dillard Dept. Stores*, 18 F. Supp. 2d 1256, 1277 (D. Kans. 1998) (holding that ratio of 20:1 of compensatory damages to punitive damages "does not in itself violate due process"); *Deters v. Equifax Credit Info. Svcs.*, 981 F. Supp. 1381, 1389-91 (D. Kans. 1997) (holding that award for plaintiff in Title VII sexual harassment claim of $ 5,000.00 in compensatory damages and $295,000.00 in punitive damages was not excessive nor violative of the defendant's substantive due process rights under the Constitution).

Second, each defendant's conduct was sufficiently reprehensible to justify the punitive damages award as to each plaintiff. "BMW instructs that there are several indicia of reprehensibility: deliberate false statements, acts of affirmative misconduct or concealment of evidence of improper motive, and repetition of tortious conduct." *Johansen*, 170 F.3d at 1335. Defendant Cooper admitted at trial that he considered race to be a legitimate factor in employment related decisions. He admitted that in the meeting in which the fate of the Plaintiffs was decided, he told Mr. Bockman that he was looking at things from the perspective of a white man and should look at it from the perspective of a black man who has had to work for a white man all of his life. Cooper admitted that with regard to each of the Plaintiffs in his May 3, 1996 report, he highlighted the fact that they were "white." (Pls'. Ex. 7). In the course of his cross examination, he admitted that he had left out a number of material facts when he prepared his report. Mr. Regus himself found that "[a] conscious decision was made by [Cooper] to selectively include certain facts while excluding other facts" in his report. (Pls'. Ex. 8). Cooper acknowledged to Regus that he "failed to include in [his] report steps taken by Mr. Bockman and others to respond to complaints of racial harassment at Big Creek because [he] personally did not believe they were sufficient." (Pls'. Ex. 8). Perhaps most significantly, on the very day that he issued his inaccurate and false report, Cooper

delivered to the Equal Employment Opportunity Commission a separate position statement which vigorously denied any failure on the part of the Plaintiffs or Fulton County to prevent or correct the alleged racial harassment at Big Creek.

Defendant Cooper admitted that his televised interview announcing that the Plaintiffs would be disciplined ("make no mistake about it") was something he had never done before or since. Cooper admitted to sending his false report to County Commissioner Emma Darnell and releasing it to the media. He admitted that, notwithstanding County Attorney Denval Stewart's admonition that such material could seriously injure the reputations of the Plaintiffs, such warnings were of no consideration to him. Cooper's recommendations for discipline of the Plaintiffs, passed on to County Manager Regus, were followed, down to the personnel regulations sections cited in the discipline notices. (Pls'. Exs. 1, 3 and 5) Defendant Cooper admitted that he did not provide to Regus a copy of the interview with Curtis Brown, an African-American supervisor at Big Creek who admitted observing racially harassing behavior, drug use by employees on Fulton County property and weapons violations, but failed to report it or do anything else to prevent it.

Construing the evidence in favor of the Plaintiffs, the jury could conclude that Defendant Cooper's misconduct was not a single inadequate report, but repeated acts of deceit through falsification of material facts and omission of material facts. The deceitful conduct occurred not once, but repeatedly with regard to all three Plaintiffs. The false and misleading report report was distributed to the media where Cooper knew it would be disseminated widely. There is no question that Cooper deliberately misstated facts in his report, knowing that this was likely to result in their public discipline and humiliation. Defendants' contention that testimony from witness Josh Kenyon in some way biased the jury is without

merit. The Court took appropriate action after the testimony was inadvertently introduced during the reading of a deposition.

The evidence at trial showed that Defendant Regus became fully aware as early as May 15, 1996, that the Cooper report was false, fraudulent, misstated facts and intentionally omitted other facts. (Pls'. Ex. 8). Defendant Regus himself testified that as of that time he knew that the report was replete with inaccuracies. Furthermore, he observed Defendant Cooper make a comment in the May 15 meeting which even Regus viewed as "biased." The Cooper report itself characterized each of the Plaintiffs as "white." Little else in the report was true. Notwithstanding his knowledge that the report was biased and inaccurate, Defendant Regus forwarded it to each of the Commissioners. He also followed the precise advice given by Cooper in the report, to discipline the department heads, managers and supervisors at Big Creek. Indeed, he disciplined them pursuant to Article 21, something he admitted he had never done before or since, as recommended in Defendant Cooper's April 29 report. Defendant Regus was aware of Denval Stewart's sharp criticism of the April 29 Cooper report as early as May 3. Nevertheless, Defendant Regus did nothing to correct the misrepresentations disseminated to the Commissioners and the media. Finally, Defendant Regus issued a memo to the Commissioners and a virtually identical press release which recited that after having received Mr. Cooper's report as well as a response from Mr. Bockman, Mr. Regus convened a meeting on May 15, 1996 with a number of individuals, including among them, Mr. Cooper. The memo to the Commissioners and to the press states, "As a result of that meeting, I have taken steps to initiate disciplinary action against three mid level supervisory employees in the Public Works Department." (Pls'. Ex. 46). Nowhere in the memo does Mr. Regus make the contentions that he subsequently made at trial, that the Cooper report was inaccurate, that he knew it and he did

not follow it. The jury was authorized to see these conflicting statements as evidence of pretext and, consequently, of discrimination.

The third factor to be considered is whether the punitive damage award reflects "the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *BMW*, 517 U.S. at 575. Defendants argue that there is no comparable sanction against individuals for discrimination in the workplace. This argument ignores 42 U.S.C. § 1983 which, in itself, put the Defendants on notice of the possible consequences of violating Plaintiffs' constitutional rights. Significantly, the fine for a criminal conspiracy civil rights violation is a fine of up to $ 250,000, less than the punitive damage awards. *See* 18 U.S.C. §§ 241 and 3571. It is well settled that a public official will face punitive damages if that person violates a public employee's right to equal protection under the laws with either malice or reckless indifference to federally protected rights. Considering the guideposts identified in BMW and Johansen, the punitive damage awards are not excessive.

It is also well settled that the financial circumstances of an individual defendant may be a relevant consideration for an award of punitive damages. The defendant has the burden of proving that his financial circumstances warrant a reduction in a punitive damages award. *Paul v Avril*, 901 F. Supp. 330, 336 (S.D. Fla. 1994) ("although in assessing punitive damages, the court must consider the defendant's financial condition, the burden is on the defendant to introduce evidence of his modest means.") (citing *Zarcone v Perry*, 572 F.2d 52, 56 (2d Cir. 1978)). The Defendants did not introduce any such evidence in this case. Probably, this was a deliberate trial decision to avoid opening the door to introduction of evidence concerning Fulton County's policy of indemnifying

employees against judgments in cases such as this. No evidence having been introduced, the Court has no basis to reduce the punitive damages award on this ground.

CONCLUSION

For these reasons, the Court concludes that the punitive damage awards are not excessive. The Clerk is directed to enter separate judgments in favor of each of the Plaintiffs consistent with this Order.

SO ORDERED, this 25 day of May, 2000.

/s/ Thomas W. Thrash, Jr.
THOMAS W. THRASH, JR.
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:97cv 1243-TWT

CHESTER L. LAMBERT, III WILLIAM E. MOWREY;
and JAMES M. HEATH

Plaintiffs,

v.

FULTON COUNTY, GEORGIA *et al.*,

Defendants.

AMENDED JUDGMENT

(Per Court's Order filed July 19, 2000)

This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict in favor of the Plaintiffs CHESTER L. LAMBERT, III, WILLIAM E. MOWREY and JAMES M. HEATH and against the Defendant FULTON COUNTY, GEORGIA for compensatory damages and back pay and against Defendants ROBERT J. REGUS and MICHAEL G. COOPER for compensatory and punitive damges.

Judgement hereby entered in the amount of $300,000.00 compensatory damages and $10,398.33 for back pay in favor of the Plaintiff CHESTER L. LAMBERT, III and against the Defendant FULTON COUNTY, GEORGIA, plus costs and interest at the legal rate from the date of this judgment to the date payment made in full.

Judgement hereby entered in the amount of $300,000.00 compensatory damages and $4,204.00 for back pay in favor

of the Plainitiff WILLIAM E. MOWREY and against the Defendant FULTON COUNTY, GEORGIA, plus costs and interest at the legal rate from the date of this judgment to the date payment made in full.

Judgement hereby entered in the amount of $300,000.00 compensatory damages and $3,679.18 for back pay in favor of the Plaintiff JAMES M. HEATH and against the Defendant FULTON COUNTY, GEORGIA, plus costs and interest at the legal rate from date of this judgment to the date payment made in full.

Judgement hereby entered in the amount of $50,000.00 compensatory damages and $225,000.00 punitive damages in favor of the plaintiff CHESTER L. LAMBERT, III and against the Defendant ROBERT J. REGUS plus costs and interest at the legal rate from the date of this judgment to the date payment made in full.

Judgement hereby entered in the amount of $50,000.00 compensatory damages and $225,000.00 punitive damages in favor of the plaintiff WILLIAM E. MOWREY and against the Defendant ROBERT J. REGUS plus costs and interest at the legal rate from the date of this judgment to the date payment made in full.

Judgement hereby entered in the amount of $50,000.00 compensatory damages and $225,000.00 punitive damages in favor of the plaintiff JAMES M. HEATH and against the Defendant ROBERT J. REGUS plus costs and interest at the legal rate from the date of this judgment to the date payment made in full.

Judgement hereby entered in the amount of $50,000.00 compensatory damages and $225,000.00 punitive damages in favor of the plaintiff CHESTER L. LAMBERT, III and against the Defendant MICHAEL G. COOPER plus costs and interest at the legal rate from the date of this judgment to the date payment made in full.

Judgement hereby entered in the amount of $50,000.00 compensatory damages and $225,000.00 punitive damages in favor of the plaintiff WILLIAM E. MOWREY and against the Defendant MICHAEL G. COOPER plus costs and interest at the legal rate from the date of this judgment to the date payment made in full.

Judgement hereby entered in the amount of $50,000.00 compensatory damages and $225,000.00 punitive damages in favor of the plaintiff JAMES M. HEATH and against the Defendant MICHAEL G. COOPER plus costs and interest at the legal rate from the date of this judgment to the date payment made in full.

July 19, 2000

LUTHER D. THOMAS, Clerk

By /s/ [illegible]
Deputy Clerk

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:97 cv 1243-TWT

CHRISTOPHER L. LAMBERT, III; WILLIAM E. MOWREY;
and JAMES M. HEATH

Plaintiffs,

v.

FULTON COUNTY, GEORGIA, *et al*

Defendants.

JUDGMENT

This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict in favor of the Plaintiffs CHRISTOPHER L. LAMBERT, III, WILLIAM E. MOWREY and JAMES M. HEATH and against the Defendant FULTON COUNTY, GEORGIA for compensatory damages and back pay and against Defendants ROBERT J. REGUS and MICHAEL G. COOPER for compensatory and punitive damages.

Judgement hereby entered in the amount of $300,000.00 compensatory damages and $10,398.33 for back pay in favor of the Plaintiff CHRISTOPHER L. LAMBERT, III and against the Defendant FULTON COUNTY, GEORGIA, plus costs and interest at the legal rate from the date of this judgment to the date payment made in full.

Judgement hereby entered in the amount of $300,000.00 compensatory damages and $4,204.00 for back pay in favor of the Plaintiff WILLIAM E. MOWREY and against the

Defendant FULTON COUNTY, GEORGIA, plus costs and interest at the legal rate from the date of this judgment to the date payment made in full.

Judgement hereby entered in the amount of $300,000.00 compensatory damages and $3,679.18 for back pay in favor of the Plaintiff JAMES M. HEATH and against the Defendant FULTON COUNTY, GEORGIA, plus costs and interest at the legal rate from the date of this judgment to the date payment made in full.

Judgement hereby entered in the amount of $50,000.00 compensatory damages and $225,000.00 punitive damages in favor of the plaintiff CHRISTOPHER L. LAMBERT, III and against the Defendant ROBERT J. REGUS plus costs and interest at the legal rate from the date of this judgment to the date payment made in full.

Judgement hereby entered in the amount of $50,000.00 compensatory damages and $225,000.00 punitive damages in favor of the plaintiff WILLIAM E. MOWREY and against the Defendant ROBERT J. REGUS plus costs and interest at the legal rate from the date of this judgment to the date payment made in full.

Judgement hereby entered in the amount of $50,000.00 compensatory damages and $225,000.00 punitive damages in favor of the plaintiff JAMES M. HEATH and against the Defendant ROBERT J. REGUS plus costs and interest at the legal rate from the date of this judgment to the date payment made in full.

Judgement hereby entered in the amount of $50,000.00 compensatory damages and $225,000.00 punitive damages in favor of the plaintiff CHRISTOPHER L. LAMBERT, III and against the Defendant MICHAEL G. COOPER plus costs and interest at the legal rate from the date of this judgment to the date payment made in full.

Judgement hereby entered in the amount of $50,000.00 compensatory damages and $225,000.00 punitive damages in favor of the plaintiff WILLIAM E. MOWREY and against the Defendant MICHAEL G. COOPER plus costs and interest at the legal rate from the date of this judgment to the date payment made in full.

Judgement hereby entered in the amount of $50,000.00 compensatory damages and $225,000.00 punitive damages in favor of the plaintiff JAMES M. HEATH and against the Defendant MICHAEL G. COOPER plus costs and interest at the legal rate from the date of this judgment to the date payment made in full.

May 30, 2000

LUTHER D. THOMAS, Clerk

By /s/ [illegible]
Deputy Clerk

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISONS

U.S. Const., amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.S. § 1981 (2002)

§ 1981. Equal rights under the law

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C.S. § 1983 (2002)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.S. § 2000e-2 (2002)

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Supreme Court, U.S.
FILED
MAY 8 2002
OFFICE OF THE CLERK

No. 01-1568

IN THE

Supreme Court of the United States

FULTON COUNTY, GEORGIA, ROBERT J. REGUS, and MICHAEL G. COOPER,

Petitioners,

v.

CHESTER L. LAMBERT, JANICE ELAINE MOWREY as Administratrix of the Estate of WILLIAM E. MOWREY, and JAMES M. HEATH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to decide a hypothetical issue concerning the standard for "comparator evidence" in a disparate treatment discrimination case where (a) the issue was of so little importance to Respondents that they did not raise it before the Court of Appeals; (b) the Court of Appeals' decision contained no substantive discussion of the "comparator" issue; (c) the jury instruction that petitioners now wish to challenge merely recited the well-established standard already laid down by this Court; and (d) Respondents, at trial, only tangentially relied on "comparator evidence?"

2. Whether this Court should grant certiorari to decide an issue concerning qualified immunity, where Petitioners failed to argue in the Eleventh Circuit that the District Court used the wrong standard or procedure to determine qualified immunity and the Eleventh Circuit followed established law?

PARTIES TO THE PROCEEDINGS

Petitioners' statement of the parties to the proceedings below is correct. William Mowrey died in January 2002. The administrator of his estate, Janice Elaine Mowrey, has now filed unopposed motions to substitute herself on behalf of Mr. Mowrey in the District Court and Court of Appeals in this case and the District Court has entered an order substituting her for Mr. Mowrey.

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STATEMENT OF THE CASE

I. FACTS

Petitioners' statement of facts misstates or ignores the principal evidence that supported the jury's verdict. Respondents will therefore restate certain key facts.

Respondents are three white Fulton County managers who were singled out, publicly disciplined and made scapegoats in the news media in connection with public allegations regarding anonymously written racial slurs and vandalism at Fulton County's Big Creek Water Treatment Facility (PE 41, 7, 8, 1, 3, 5).[1] Respondent Lamar Lambert ("Lambert") was a civil engineer responsible for the North Fulton Water System and water and sewer maintenance (Doc. 184 - pp. 521-22).[2] Respondent William Mowrey ("Mowrey") was Area Construction Supervisor, Operating Manager for South and North Fulton County waste water treatment plants. (Doc. 183 - pp. 223-26). Respondent James Heath ("Heath") was acting supervisor of the Big Creek Waste Water Treatment Plant. (Doc. 185 - pp. 744, 747). All three managers encountered the problem of reacting to anonymous

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1. Respondents will refer to the record as they did in the Court of Appeals. "PE" means "Plaintiffs' Exhibit" and is followed by the referenced exhibit number. The collected exhibits were not given a docket number in the District Court record.

2. Respondents will refer to the trial transcript as they did in the Court of Appeals. "Doc." refers to the docket sheet entry number from the District Court record. The trial transcript was entered in ten volumes from docket numbers 182 to 191. Following the docket number for the volume in which the citation appears is the page number for the particular citation.

racial slurs that were "found" at the Big Creek Waste Water Treatment Plant by two black employees, David Parker and Arthur Glass, who used these occasions as the basis for bringing their complaints of race discrimination. This led to the involvement of numerous supervisory and management level employees, including Respondents, in investigating and attempting to stop the anonymous slurs. Ultimately, Petitioners singled out Respondents for punishment for the events surrounding the anonymous slurs and publicly punished them. *See generally*, *Lambert v. Fulton County*, 253 F.3d 588, 590-93 (11th Cir. 2001).

Petitioners overlook the contents of Fulton County Director of Equal Employment Opportunity, Michael Cooper's ("Cooper"), two reports to County Manager Robert Regus ("Regus") concerning the incidents at Big Creek (PE 41, 7), which recommend Respondents' discipline, and Cooper's admission that the two reports selectively excluded certain material facts while including others. (Doc. 188 - pp. 1589-92). They omit Regus' admission that when Cooper told Director of Public Works, Frank Bockman, he was "looking at it from a white man's perspective and that he should look at it from the perspective of a black man who has had to work for a white man all his life," he injected race into the meeting in which Respondents' discipline was contemplated (PE 8; Doc. 188 - p. 1667). Petitioners failed to include in their facts Regus' admission that, at the time that he disciplined Respondents, he knew that Cooper's report was riddled with inaccuracies and misstatements and that Cooper himself was "biased." (PE 8; Doc. 188 - pp. 1602, 1606, 1607, 1610, 1624, 1633). Despite this knowledge, Regus followed the exact same County disciplinary policies that Cooper recommended, for the first and only time he used these policies in his career as County Manager. (PE 1, 3, 5, 7, 64; Doc. 188 - p. 1651).

Petitioners also omitted the fact that Regus, after he received Cooper's report, but before he disciplined Respondents, also reviewed Fulton County's EEOC Position Statement regarding David Parker and Arthur Glass' charges of discrimination, which completely vindicated Respondents' handling of the situation at Big Creek. (PE 40; Doc. 188 - p. 1610). Petitioners omit evidence that Regus reviewed only select material prior to disciplining Respondents, failed to interview Respondents (Doc. 188 - pp. 1634-1638), and refused to review or ignored material that would have vindicated them. (Doc. 188 - pp. 1589-92). Finally, while Petitioners argue that different employees were not in the same "chain of command," Regus admitted that he had authority to discipline all employees referenced in their statement of the case. (Doc. 188 - p. 1621).

Petitioners fail to include in their petition Cooper's admission at trial that his report was incomplete, inaccurate and biased:

> Yes, you can say I left out a whole bunch of things, if you want to put it that way. I didn't give them all the tapes, put what everybody said.

(Doc. 188 - p. 1589). Cooper admitted he left out material facts from his report. (Doc. 188 - p. 1592). He admitted that he left out of his report the fact that a witness, James Lucas, was offered a bribe by Parker to help him bring his claim. (Doc. 188 - p. 1590-91). He admitted that he left out Glass' statement that Parker conspired to plant cocaine in Respondent Heath's truck. (Doc. 188 - p. 1591). He admitted that he left out evidence from Lucas that Parker or Glass had, in all probability, actually cut their own brake line. *Id.* He admitted he failed to give any weight to the fact that all

but one of the racial slurs were "discovered" by Parker or Glass. *Id.* He admitted that he omitted the written statements of Respondents in which they recounted in detail their efforts to stop the racial slurs, investigate or take steps to eliminate any hostile work environment. (DE 103, 105; PE 35; Doc. 188 - p. 1591). He admitted he failed to mention that Parker's letter and Respondent Lambert's response both were copied to Mozelle Acey and Fred Artis, and that neither of them took any action on that matter. (Doc. 188 - p. 1591-92). He admitted he failed to mention that supervisor Brown stated that he saw employees smoke pot on the job and tolerated racial slurs and failed to report any of this to his supervisors. (Doc. 188 - p. 1592).

On pages 13 and 14 of their Petition, Petitioners state that Cooper's report "did not recommend that any particular individuals be disciplined." In fact, Cooper's report names each respondent by name, position and race, then at its conclusion states:

> . . . I strongly recommend immediate disciplinary action consistent with violations of personnel regulations. Disciplinary actions should not be limited just to employees involved but should also include supervisors, middle and upper management and department heads. (PE 8).

Petitioners omit evidence gathered by Bockman and Acey in a separate investigation that was reviewed by Regus and did not find fault with Respondents and found that Parker attempted to bribe a witness and conspired to plant drugs in supervisor Heath's vehicle. (PE 37, 38, 39; Doc. 186 - pp. 1155-56).

In short, Petitioners failed to acknowledge that Cooper admittedly lied in his report and that Regus, knowing that Cooper lied and knowing that Cooper was biased and injected race into the proceedings, nonetheless adopted his recommendations. (PE 1, 3, 5, 7, 8, 41; Doc. 188 - p. 1633, 1658). Although Regus subsequently gave Cooper a private written reprimand, ignoring County policy which required Regus to terminate Cooper, (PE 8; PE 45 - p. 60, Article 7; Doc. 188 - pp. 1632-33, 1658), Regus publicly disciplined Respondents, ignoring policy which gave him the discretion to discipline them much less harshly. (PE 45 - p. 66; PE 47, 48). Regus chose the harsher sanctions of suspension and demotion for Mowrey and Heath and termination for Lambert and delivered them in a way that was public and humiliating (PE 1, 3, 5, 46, 47, 48) in order to "serve up" three white scapegoats to local media.

II. PROCEEDINGS BELOW

Petitioners did not raise any issue concerning the District Court's jury instruction regarding comparators on appeal in the Eleventh Circuit, nor did Petitioners argue that the District Court had allowed the jury to decide the qualified immunity issue.

A. The Comparator Issue Was Not Raised On Appeal.

Nowhere in their Brief to the Eleventh Circuit did Petitioners mention the District Court's jury instruction concerning comparators or the appropriate standards for determining comparators. The issue also was not mentioned in their Reply Brief. Petitioners' Brief and Reply Brief discussed facts relating to Ms. Acey, Mr. Cooper and

Mr. Brown in arguing that there was no evidence to support the jury's verdict. (Brief of Appellants, Eleventh Circuit Court of Appeals, pp. 41, 45-46; Reply Brief of Appellants, Eleventh Circuit Court of Appeals, pp. 12-14)

The Eleventh Circuit briefly discusses the comparator issue in the section of its opinion titled "Sufficiency of the Evidence." *Lambert v. Fulton County*, 253 F.3d 588, 594-95 (2001). In a lengthy paragraph outlining the evidence which supported the verdict, the Court states,

> At the same time, Regus treated similarly situated black employees, namely Acey and Brown, more leniently than the white plaintiffs and imposed no real discipline on Cooper even though Cooper's misconduct, unlike that of plaintiffs, was willful.

253 F.3d at 595. This is the entire discussion of comparator evidence. There is no discussion of the jury instruction or the proper standard for determining whether comparators are similarly situated anywhere in the Eleventh Circuit's opinion, because Petitioners' chose not to raise it.

B. Petitioners Failed To Raise On Appeal The Qualified Immunity Argument Now Made.

Petitioners raised the issue of qualified immunity in the Court of Appeals by way of factual argument that Respondents had failed to show "by a preponderance of the evidence that Regus' and Cooper's official acts violated law that was clearly established at the time they acted." (Brief of Appellants, Eleventh Circuit Court of Appeals, p. 48). Petitioners made no arguments that the District Court had applied an improper standard or procedure in determining

qualified immunity. Petitioner's argued only that the evidence did not support the decision. (Brief of Appellants, Eleventh Circuit Court of Appeals, pp. 47-52). In their Reply Brief, Petitioners stated,

> While Defendants do not dispute that the District Court may, when appropriate, use written interrogatories to the jury to resolve disputed factual issues prior to ruling on qualified immunity, the District Court erred by doing so in this case because there were no factual disputes from which the jury reasonably could have concluded that Regus and Cooper intentionally discriminated against Plaintiffs.

(Reply Brief of Appellants, Eleventh Circuit Court of Appeals, p. 15). Petitioners again did not contest the standard or procedures applied by the District Court; they argued only that there were no facts in dispute concerning qualified immunity, so the Court should have found for them prior to submitting the issue to the jury.

Petitioners failed to inform this Court that the jury did not in fact decide the issue of qualified immunity, but only the question of whether or not Petitioners had intentionally discriminated against Respondents based on their race. (Doc. 133).

REASONS FOR DENYING THE WRIT

I. The District Court's Jury Instruction Concerning Comparators Was Not Properly Raised On Appeal, Followed Existing Supreme Court Precedent, Properly Stated The Standard, And Even If Erroneous Would Not Be A Basis For Reversal.

A. The Issue Of The Proper Standard For Comparator Evidence As Articulated In The District Court's Jury Instruction Was Not Raised On Appeal.

As discussed above in the section labeled "Proceedings Below," Petitioners did not raise on appeal the issue concerning the District Court's instruction on comparators or the standard for determining whether comparators are similarly situated. In their brief in the Court of Appeals, Petitioners did not discuss the District Court's jury instruction which they now contest, the "nearly identical" standard for comparators which they now propose or the proper standard for comparator evidence. The Eleventh Circuit therefore did not address the issue or discuss it in its opinion.

This Court generally will not issue a writ of certiorari to consider an issue that has not been presented and ruled on below. *Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 1029 (1997); *Duignan v. United States*, 274 U.S. 195, 200, 47 S. Ct. 566, 568 (1927); *United States v. Lovasco*, 431 U.S. 783, 788, n.7, 97 S. Ct. 2044, 2048, n.7 (1977); *United States v. Ortiz*, 422 U.S. 891, 898, 95 S. Ct. 2585, 2589 (1975). This Court has noted "the value to this Court of a fully developed factual and legal record upon which to base decisions" in determining that certiorari should not be

granted where an issue has not been presented to the lower courts. *Adams*, 520 U.S. at 92. There is no reason to depart from this general practice in this case. The issue concerning standards for comparators which Petitioners seek to present to this court was not presented or ruled on below. As the record below is not fully developed on this issue, certiorari should not be granted to consider it.

B. This Court Has Already Decided The Issue Petitioners Seek To Raise.

Petitioners argue that this Court should issue a writ of certiorari because the District Court instructed the jury on an improper standard concerning comparators. Petitioners state:

> In the instant case, the court permitted the jury to consider the treatment of Acey and Cooper as evidence of disparate treatment if they found Acey or Cooper to have engaged in misconduct that was "nearly identical or of comparable seriousness" to Respondents.

(Petition for Writ of Certiorari, p. 25). Petitioners argue that this Court should issue a writ of certiorari to determine the appropriate standard for comparators. However, as the Petitioners note (Petition for Certiorari, pp. 22-23), this Court has already addressed this very issue. In *McDonald v. Sante Fe Transportation Company*, 427 U.S. 273, 283-84, 96 S. Ct. 2574 (1976), the Court held:

> Of course, precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an

> allegation that other "employees involved in acts against (the employer) of comparable seriousness . . . were nevertheless retained . . ." is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext. 411 U.S., at 804, 93 S.Ct. at 1825.

Id. at 283, n.11, 2580, n.11. *See also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 93 S. Ct. 1817, 1823 (1973). The District Court employed the very language used in *McDonald* and *McDonnell Douglas*, regarding "comparable seriousness," to instruct the jury in this case. (Doc. 190 - p. 1872). The Court should not grant certiorari to consider a question on which it has already specifically ruled. Particularly in the area of statutory interpretation, where Congress can correct any improper interpretation, the Court has been reluctant to depart from the principle of *stare decisis*. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73, 109 S. Ct. 2363, 2370 (1989) (*stare decisis* has "special force" in statutory interpretation); *Faragher v. City of Boca Raton*, 524 U.S. 775, 804, n.4, 118 S. Ct. 2275, 2291, n.4 (1998). The District Court's instruction used the appropriate language from this Court's precedent. Certiorari should not be granted to reconsider that statutory interpretation.

C. This Case Does Not Provide An Appropriate Vehicle For Deciding The Comparator Issue Because The Finding Of Discrimination Was Based Primarily On Other Compelling Evidence Of Discrimination.

When the overall instructions accurately express the law, reversal is not required because isolated clauses may be confusing, technically imperfect or otherwise subject to criticism. Reversal is only required if the reviewing court is left with "a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *McElroy v. Firestone Tire & Rubber, Co.*, 894 F.2d 1504, 1509 (11th Cir. 1990). In addition to the charge now belatedly challenged by Petitioners, the Court repeatedly instructed the jury that it must find intentional race discrimination. (Doc. 190 - pp. 1870, 1871). The Court's charge as a whole clearly requires that the jury find intentional discrimination and makes clear that the jury should not second guess the employer. (Doc. 190 - pp. 1869-72). The jury was asked special interrogatories and answered them with a finding that Mr. Regus and Mr. Cooper intentionally discriminated against the respondents. (Doc. - pp. 1885, 1886).

There was a substantial amount of evidence of discrimination in addition to the disparate treatment of Mr. Cooper, Mr. Brown and Ms. Acey. The principal evidence against both Mr. Regus and Mr. Cooper was Mr. Cooper's biased report which identified Respondents by race and omitted or distorted substantial parts of the evidence to the detriment of Respondents. The omissions and distortions uniformly favored African American employees and disfavored Caucasian employees. Mr. Cooper also specifically introduced race into discussions of the matter.

Mr. Regus was present for Mr. Cooper's race based remarks and relied on Mr. Cooper's report, despite knowing of Cooper's racial bias and knowing his report was false. Regus followed Cooper's recommendations of discipline to the letter and to the person, publicized the report to the media and the County Commissioners, then buried the Bockman report, which exonerated Respondents and accused Parker and Glass of manufacturing the racial incidents themselves. *See* "Statement of the Case" above and *Lambert*, 253 F.3d at 590-595 (stating facts of case and reviewing evidence which supported the verdict).

Unlike cases which rely exclusively on comparator evidence, the issue of comparators is not the central issue in this case. Indeed as noted above, in the Court of Appeals, Petitioners did not even raise the issue on which they now petition for the writ of certiorari. Consequently, it has not received the factual and legal development that might be helpful to this Court in resolving the issue.

This case would be an inappropriate vehicle to resolve any issue concerning comparator evidence because the evidence in this case does not follow the common format of comparator cases. In this case, there are at least three individuals who were not significantly disciplined to whom Respondents compared their treatment. The evidence showed a pattern of Caucasian employees being disciplined, no matter what their position, and African-American employees not being disciplined. Furthermore, the discipline of employees mirrored the recommendations in Cooper's report. The pattern of discipline, particularly as combined with the racially biased recommendations of Cooper's report, was relevant to this case. This was not a case where a significant

part of the evidence was a comparison of one plaintiff to one comparator as it is in the typical case where comparator evidence is at issue.

II. The Eleventh Circuit Followed Established Law Concerning Qualified Immunity.

The Supreme Court ordinarily refuses to grant a petition for certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. Petitioner's argument does not state that the Eleventh Circuit misstated the law and in effect asks this Court to review the Eleventh Circuit's proper statement of the law as it was applied to the facts of this case. *See* discussion in section titled "Proceedings Below."

Petitioners state that the qualified immunity determination should be decided by the court. (Petition for Writ of Certiorari, p. 27). The Eleventh Circuit noted that it reviewed "*de novo* the denial of qualified immunity." *Lambert*, 253 F.3d at 596. It then stated that the District Court had properly denied qualified immunity. *Id.* at 597. Thus, the Eleventh Circuit recognized that the District Court, not the jury, had ruled on the issue of qualified immunity.

Petitioners' argument that the District Court submitted the qualified immunity issue to the jury is erroneous on its face. The District Court decided the issue of qualified immunity as a matter of law. It based that decision in part on the jury's finding of fact that Mr. Regus and Mr. Cooper intentionally discriminated. *Id.* at 597. Petitioners stated below that

> While Defendants do not dispute that the District Court may, when appropriate, use written interrogatories to the jury to resolve disputed factual issues prior to ruling on qualified immunity, the District Court erred by doing so in this case because there were no factual disputes from which the jury reasonably could have concluded that Regus and Cooper intentionally discriminated against Plaintiffs.

(Reply Brief of Appellants, Eleventh Circuit Court of Appeals, p. 15). In essence, Petitioners are asking this Court to resolve a **factual dispute, not a legal issue.** There were facts in dispute in this case, and the District Court properly decided the qualified immunity issue using the facts as determined by the jury. The Eleventh Circuit then reviewed this decision *de novo*. The District Court and indeed the Court of Appeals properly stated the law, as acknowledged by Petitioners below. Petitioners simply ask this Court to review the Eleventh Circuit's application of the law to the facts of this case.

Petitioners discuss at length the facts relating to qualified immunity in an apparent attempt to have this Court redetermine the issue. As noted above, Petitioners ignore many facts that support the verdict and impermissibly draw inferences in favor of themselves from the facts they state. Petitioners cite no conflict with established law or between circuits on any legal point related to qualified immunity. Petitioners have identified no legal issue relating to qualified immunity sufficient for this Court to grant a writ of certiorari.

CONCLUSION

For the reasons cited above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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